

“Foreign Authority” Through a Narrow Lens: Interpretive Incorporation of Treaties

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This Article offers a narrow lens analysis of a key debate over the role of foreign authority in U.S. courts: the use of international human rights treaties in interpreting domestic law. Professor Waters argues that recent U.S. Supreme Court decisions (including Roper v. Simmons) should be viewed as part of a transnational trend among common law courts---a trend that she calls creeping monism. Common law courts are increasingly abandoning their traditional dualist orientation to treaties and are beginning to utilize human rights treaties despite the absence of implementing legislation giving domestic legal effect to the treaties. By developing a wide variety of so-called interpretive incorporation techniques, courts are entrenching international treaty obligations into domestic law, thus becoming powerful mediators between the domestic and international legal regimes.

The Article traces the growing influence of creeping monism and interpretive incorporation, in an attempt to shift the discourse away from the all-or-nothing debate of recent years to a more nuanced understanding of the complexities involved in incorporating international legal sources into the work of domestic courts. Drawing on a six-year study of judicial treatment of the International Covenant on Civil and Political Rights by the U.S. Supreme Court and four other common law jurisdictions, the Article develops a typology of interpretive incorporation techniques that courts are utilizing. It also provides statistical evidence regarding the use of human rights treaties across jurisdictions. Finally, it maps out a possible normative framework for evaluating courts’ use of human rights treaties in interpreting domestic law.

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In the increasingly divisive debate over the role of foreign and international law in U.S. courts, scholars, judges, and policymakers on both sides of the issue share a common approach: They have viewed the debate through a wide lens, tending to conflate foreign and international legal sources and to treat both kinds of sources as part of a broad, vaguely defined category known as

“foreign authority”¹ Opponents of the trend condemn the use of so-called “foreign authority”² in constitutional analysis, while proponents describe with approval “the emergence of a transnational law . . . that merges the national and the international.”³ Much of the existing scholarship echoes the wide lens approach, tending to focus broadly on the development of informal networks and dialogue among the world’s courts---while giving less attention to detailed examination of the specific legal sources and techniques that courts are using to participate in this dialogue.⁴

¹ A typical example of judicial conflation of foreign and international sources is the Ninth Circuit’s recent decision in a case questioning whether the execution of the elderly violated the norms of international and domestic law. The court found that “[w]hile international norms may also be instructive in this analysis, in light of the nonexistence of domestic authority supporting [petitioner’s] claim, and the lack of definitive international authority provided by [petitioner], we, as an intermediate court, decline to consider the asserted practices of foreign jurisdictions.” *Allen v. Ornoski*, 435 F.3d 946, 952 n.8 (9th Cir. 2006). Additionally, I have argued that in *Lawrence v. Texas*, 539 U.S. 538 (2003), Justice Kennedy mistakenly conflated the use of foreign sources for comparative analysis with their use as evidence of customary international law. Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 *Geo. L.J.* 487, 564--68 (2005) (describing and critiquing Justice Kennedy’s approach); see also Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 *Harv. L. Rev.* 148, 149--151 (2005) (characterizing Supreme Court as seemingly taking approach that merely looks to existence of foreign case holdings without regard to reasoning).

² For example, at hearings on a House resolution that would restrict the use of “foreign authority” by U.S. courts, most witnesses did not address possible distinctions between foreign judicial decisions and international treaties. See *House Resolution on the Appropriate Role of Foreign Judgments in the Interpretation of the Constitution of the United States: Hearing on H.R. 97 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 11 (2005) (statement of M. Edward Whelan, President, Ethics and Public Policy Center) (describing use of international treaties in *Roper v. Simmons*, 543 U.S. 551 (2005), as evidence that “misuse of foreign law is real and growing).

³ Harold Hongju Koh, *International Law as Part of Our Law*, 98 *Am. J. Int’l L.* 43, 53 (2004) [hereinafter Koh, *International Law*]. Justice Breyer shares this view, noting:

My description [of the growing influence of international law] blurs the differences between what my law professors used to call comparative law and public international law. . . . Analogous developments internationally, including the emergence of regional or specialized international legal bodies, tend similarly to produce cross-country results that resemble each other more and more, exhibiting common, if not universal, principles in a variety of legal areas.

Stephen Breyer, *Keynote Address at Proceedings of the Ninety-Seventh Meeting of the American Society of International Law*, 97 *Am. Soc’y Int’l L. Proc.* 265, 267 (2003).

Some of the superb essays collected in a recent *Harvard Law Review* symposium on *Roper* also tend to discuss “foreign authority,” by which the authors mean both foreign and international law. See Symposium, *The Debate over Foreign Law in Roper v. Simmons*, 119 *Harv. L. Rev.* 103 (2005).

⁴ The broad lens approach to judicial dialogue is also characteristic of both the transnational legal process, see, e.g., Koh, *International Law*, *supra* note 3, and transgovernmentalism schools. See, e.g., Anne-Marie Slaughter, *The Real New World Order*, *Foreign Aff.*, Sept.-Oct. 1977, at 183, 189 (“The global community of law emerging from judicial networks will more likely encompass many rules of law No high court would hand down definitive global rules. National courts would interact with one another and with supranational

While the wide lens approach has been useful in sketching out the broad contours of the debate over the role of foreign and international law, such an approach misses important parts of the overall picture. Distinctions among both legal sources and methodologies are of crucial importance to courts in developing a principled jurisprudence regarding the proper treatment of foreign and international legal sources.⁵ After all, international treaties may prove to be either more or less authoritative sources for U.S. courts than foreign judicial decisions; and within each of these categories, a particular treaty or foreign court decision may be more or less worthy of judicial consideration than others.⁶ By the same token, courts must consider important distinctions among interpretive techniques: Some uses of foreign or international legal sources may prove to be perfectly legitimate and well within the ambit of the judiciary's traditional role, while other, more ambitious techniques may give us pause.⁷ By failing to distinguish among sources and techniques, the current scholarly discourse has exacerbated an overly simplistic, "Crossfire"-style policy debate, in which policymakers debate the relative merits of so-called "foreign authority," with little understanding of what that term might mean.

In short, as the debate over the role of foreign and international law in domestic courts matures, it is time to move beyond discussions of "foreign authority", and to examine these issues through a series of narrower lenses. A narrow lens approach focuses on one particular source of legal authority, and explores the range of specific techniques that enable courts to utilize that source

tribunals in ways that would accommodate differences but acknowledge and reinforce common values." See generally Waters, *supra* note 1, at 497--501 (discussing application of transnational legal process and transgovernmentalism theories to judicial dialogue).

⁵ See, e.g., Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 Am. J. Int'l L. 69, 72 (2004) ("A serious intellectual project to use international materials requires a fully articulated theory that answers both of these questions in a way that can be applied consistently from case to case.").

⁶ For example, a treaty ratified by the United States may be a more authoritative source than an unratified treaty for use in constitutional interpretation. Similarly, Justice Breyer implicitly acknowledged that some foreign judicial decisions have little persuasive value, admitting that he had made a "tactical error" when he cited a decision from the Zimbabwe Supreme Court in support of his argument for the unconstitutionality of the "death row phenomenon." Zimbabwe, Justice Breyer wryly noted, "is not the human rights capital of the world." Stephen Breyer, *Assoc. Justice, Supreme Court, Remarks with Antonin Scalia at the U.S. Association of Constitutional Law Discussion: Constitutional Relevance of Foreign Court Decisions* (Jan. 13, 2005), at <http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument> (on file with the *Columbia Law Review*) (referring to his opinion in *Knight v. Florida*, 528 U.S. 990, 996 (1999) (Breyer, J., dissenting from denial of cert.), in which he cited Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General, [1993] 1 Zimb. L.R. 239, 240, 269 (S) (1999), for the proposition that delays in decision whether to impose death penalty were inhuman and constituted torture).

⁷ See discussion *infra* Part II.

in interpreting domestic law. A narrow lens approach also seeks to address both empirical and normative questions. It asks, first, how are courts utilizing a specific kind of foreign or international legal source? What techniques are they using? And second, should courts be utilizing that particular source in a given way? Do the techniques that they are developing raise legitimacy concerns, and if so, can those concerns be addressed?

The practical value of the narrow lens approach is two-fold: First, it reveals important trends in judicial treatment of foreign and international sources that existing scholarship---with its tendency to focus on broad notions of “foreign authority” or “transnational law”---has missed. Second, a narrow lens approach will assist courts in developing a principled methodology for incorporating some foreign or international sources of law in their work, by helping them to distinguish and choose among available incorporation techniques. A narrow lens approach will thus help to shift the discourse away from the overly simplistic, all or nothing, “Crossfire”-style debate of recent years, to a more nuanced understanding of the complexities involved in incorporating foreign and international legal sources into the work of domestic courts.

To demonstrate the value of the narrow lens approach, this Article brings a narrow lens to the analysis of one important source of authority: judicial treatment by U.S. courts and their common law counterparts of certain international human rights treaties in interpreting domestic law. Human rights treaties are of particular relevance for U.S. courts: In its most ambitious use of international sources to date, the U.S. Supreme Court in *Roper v. Simmons*⁸ relied on several human rights treaties in striking down laws permitting the execution of juvenile offenders. What the Court in *Roper* did not acknowledge is that the international human rights treaties on which it relied⁹ are either unratified treaties (like the Convention on the Rights of the Child (CRC)¹⁰) or so-called “unincorporated” treaties (that is, non-self-executing treaties that have not been legislatively incorporated into U.S. law).¹¹ In both cases, the treaties relied upon by the *Roper* Court do not constitute legally enforceable obligations in U.S. courts. But the *Roper* majority asserted that the treaties nonetheless provided

⁸ 543 U.S. 551 (2005).

⁹ See *id.* at 576 (listing international agreements that prohibit execution of juveniles).

¹⁰ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

¹¹ For example, the Court cited provisions in the International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 138 Cong. Rec. S4781-84 (1992), 999 U.N.T.S. 171 (entered into force Mar. 3, 1976) [hereinafter ICCPR], prohibiting the use of the juvenile death penalty. *Roper*, 543 U.S. at 576. In ratifying the ICCPR, however, the United States declared the treaty to be “non-self-executing,” meaning that it has no force and effect within the domestic legal system until the U.S. Congress passes implementing legislation specifically giving effect to the treaty’s provisions. 138 Cong. Rec. S4781-84. In addition, the United States’s ratification instrument for the ICCPR included a specific reservation regarding the juvenile death penalty. *Id.* The Congress has never legislatively incorporated the ICCPR into U.S. law.

evidence of “the overwhelming weight of international opinion against the juvenile death penalty.”¹² Other courts have adopted similar strategies in utilizing unincorporated human rights treaties.¹³

This Article has three primary goals. First, it places the majority opinion in *Roper* in a broader context, arguing that it is in fact part of a transnational trend among the world’s common law courts---a trend that I call “creeping monism.” Previously unexplored in the literature, creeping monism describes a phenomenon in which common law courts are abandoning their traditional dualist orientation and are beginning to utilize unincorporated human rights treaties in their work despite the absence of implementing legislation giving domestic legal effect to the treaties.¹⁴ In so doing, these courts are entrenching their nations’ international treaty obligations into domestic law, thus becoming powerful domestic enforcers of international human rights law. In Part I, I trace the growing influence of creeping monism on common law judges, exploring its impact on the human rights jurisprudence emanating from common law courts and on the emerging transnational judicial dialogue on human rights law.

Second, the Article uses empirical analysis to move the debate over the use of human rights treaties in U.S. courts toward a more nuanced understanding of the complexities involved. In Part II, I develop a typology of available interpretive incorporation techniques that other common law courts are using---and that U.S. courts can choose among in utilizing human rights treaties in their work. The typology is built around an empirical study of common law courts’ treatment of one of the major international human rights instruments---the International Covenant on Civil and Political Rights (ICCPR). I examine case law from several high courts throughout the common law world, as well as recent decisions in U.S. courts, and I identify and assess a variety of techniques that courts are developing to judicially incorporate the ICCPR into domestic law. I also provide statistical evidence regarding the rates at which different national courts are discussing and relying upon human rights treaties in their work, as well as the specific interpretive incorporation techniques that they favor. The techniques defy easy characterization into traditional international law categories: Courts are neither using human rights treaties as binding treaty law, nor is it clear that they are simply relying on these sources as evidence of customary international law. Instead, these new interpretive techniques occupy a grey zone in international law, in which unincorporated human rights treaties are useful for

¹² *Roper*, 543 U.S. at 574--77. Justice Kennedy, writing for the majority, asserted that international opinion can play a confirmatory role in interpreting the U.S. Constitution, arguing that “[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.” *Id.* at 578.

¹³ See *infra* Part II (discussing case law).

¹⁴ See *infra* Part II (discussing case law).

their persuasive value or as bridges for the incorporation of various soft law sources into domestic law.¹⁵

Finally, the Article addresses some of the key normative issues that arise with respect to common law courts' increasing use of human rights treaties. There is no question that the current trend has the potential to transform the world's common law courts into increasingly powerful mediators between the domestic and international legal regimes. But the phenomenon also raises questions regarding the democratic legitimacy of this transformation in the judicial role. In Part III, I raise some of the normative issues that U.S. judges, scholars, and policymakers should consider in developing a principled approach to judicial use of human rights treaties. Drawing from the ICCPR case study, I offer an evaluative framework based on a judicial assessment of the "domestic value" of a particular treaty provision. The domestic value framework urges courts to remain deeply rooted in the domestic polity, while encouraging exploration of at least some judicial techniques for utilizing human rights treaties in interpreting domestic law. Such an approach will help to shift the discourse away from the overly simplistic, all or nothing, "Crossfire"-style debate of recent years, toward a more nuanced understanding of the complexities involved in incorporating international treaties into the work of U.S. courts.

I. The Judicial Trend Toward Creeping Monism

One of the principal values of a narrow lens approach is that it enables scholars to discern important trends in judicial use of foreign and international sources that tend to be obscured when these sources are conflated and treated as interchangeable. A close analysis of judicial use of human rights treaties, for example, reveals the influence on many common law judges of a phenomenon that I call creeping monism – that is, a gradual shift in judicial orientation toward a more flexible, monistic approach to domestic incorporation of human rights treaties. Domestic courts from common law systems have long been limited in their capacity to utilize international treaties (particularly human rights treaties) by the fairly strict dualist approach that has traditionally characterized common law systems.¹⁶ In a dualist-oriented legal regime, a treaty has non-self-executing

¹⁵ See discussion *infra* notes [].

¹⁶ See, e.g., Andrew D. Mitchell, *Genocide, Human Rights Implementation and the Relationship Between International and Domestic Law: Nulyarimma v. Thompson*, 24 *Melb. U. L. Rev.* 15, 29 (2000) (noting that in Australia, "the doctrine of parliamentary supremacy has long been held to mean that the making of a treaty does not change domestic law" (citations omitted)); Gibran Van Ert, *Using Treaties in Canadian Courts*, 38 *Can. Y.B. Int'l L.* 3, 4 (2000) (explaining that treaties require legislative implementation to have domestic effect). See also Rosalyn Higgins, *United Kingdom, in The Effect of Treaties in Domestic Law* 123 (F.G. Jacobs & S. Roberts eds., 1987) (discussing ways in which international law can become part of domestic law despite fact that unincorporated treaties "have no formal standing at all in English law"); William

status -- that is, it becomes enforceable in domestic courts only when the legislature has enacted specific legislation implementing the treaty's provisions into domestic law.¹⁷

Increasingly, however, judges in countries such as Australia, New Zealand, India, and Canada are eroding traditional dualist doctrines. Using a wide range of interpretive incorporation¹⁸ techniques, they are citing and discussing international human rights treaties for a variety of purposes in interpreting domestic law. Like the Supreme Court in *Roper*, these courts are utilizing treaties in their work despite the absence of implementing legislation giving domestic legal effect to the treaties.¹⁹ Moreover, in gradually adopting a more monistic approach to treaty incorporation, these common law courts are engaging in transnational judicial dialogue: They are relying on foreign court decisions both to develop, and to justify, their own use of monist-oriented interpretive incorporation techniques.²⁰ In short, common law judges are using creeping monism as one important means to fashion a robust transnational dialogue regarding the normative content of both domestic and international human rights law---a dialogue that is made possible in large measure due to courts' common consideration of human rights treaties as common sources of law.

The global phenomenon of creeping monism---the increasing willingness of common law courts to rely on legislatively unincorporated human rights treaties---is particularly striking given the deeply dualist tendencies of the

A. Schabas, *Twenty-Five Years of Public International Law at the Supreme Court of Canada*, 79 *Can. Bar. Rev.* 174, 177 (2001) ("Under Canadian law, it is axiomatic that treaties do not have a direct effect before national courts where they have only been ratified by the executive and not implemented by the legislature."). The dualist approach to treaties does not necessarily extend to common law courts' treatment of customary international law. See, e.g., Hilary Charlesworth et al., *Deep Anxieties: Australia and the International Legal Order*, 25 *Sydney L. Rev.* 423, 451--57 (2003) (arguing that while domestic status of customary international law in Australia is unclear, "courts have exhibited less reluctance to recognize principles of customary international law without the need for statutory implementation"); Louis LeBel & Gloria Chao, *The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion?*, 16 *Sup. Ct. L. Rev.* (2d) 23, 36 (2002) (noting status of customary international law in Canada). As I explain *infra* text accompanying notes XX-XX, the United States departs from the Commonwealth tradition of strict dualism, adopting instead a "hybrid" approach to treaty incorporation.

¹⁷ See, e.g., Higgins, *supra* note **Error! Bookmark not defined.**, at 124--25; Buergenthal, *supra* note, at 213; Mark W. Janis, *An Introduction to International Law* 85--86, 98--99 (2003) (discussing English rule prohibiting treatment of treaties as self-executing). By contrast, countries from the civil law tradition are typically much more likely to recognize treaties as part of domestic law absent implementing legislation. See Janis, at 101.

¹⁸ Justice Michael Kirby of the Australian High Court has described the set of judicial techniques as "interpretative incorporation", but he does not define the term. See, e.g., Michael Kirby, *International Law: The Impact on National Constitutions*, 99 *Am. Soc'y Int'l L. Proc.* 1, 11 (2005) [hereinafter Kirby, *Impact on National Constitutions*].

¹⁹ See *infra* Part II (discussing case law).

²⁰ See *infra* Part II.

²² See Koh, *Why Do Nations Obey*, *supra* note 25, at 2609.

common law legal tradition. In this Part, I explore how and why traditional common law dualism has begun to give way to creeping monism. To that end, I briefly discuss the origins of common law dualism, as well as the challenges that dualism faces in the modern era of human rights internationalism. Finally, I discuss the role of transnational judicial dialogue in the growth of creeping monism. I identify evidence of the trend in the Bangalore Conferences (an influential series of judicial colloquia held over the last decade of the twentieth century), and in judicial dissemination through case law of the so-called Bangalore Principles (a series of concluding statements from the judicial colloquia series that articulate and advocate a more monistic approach to treaty incorporation). Part II provides further evidence of the trend, exploring the influence of creeping monism on judicial development of a variety of interpretive incorporation techniques.

A. Historical Common Law Dualism in an Era of Human Rights Internationalism

For at least the last two centuries, courts throughout the British Commonwealth have followed a fairly strict dualist approach to treaties, generally refusing to grant legal effect to treaties that have not been legislatively incorporated into domestic law.²² Historical common law dualism had its roots in separation of powers concerns.²³ In the British Commonwealth, the ratification of most treaties was the sole prerogative of the executive.²⁴ By giving treaties non-self-executing status, common law dualism ensured that the parliament retained primary authority over the domestic implementation of a ratified treaty, thus providing an important check on the executive's treaty power.

²³ See, e.g., Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082, 1128--29 (1992) [hereinafter Vázquez, *Treaty-Based Rights*] ("The self-execution problem is of course at bottom a separation-of-powers problem. . . . The doctrine under which treaties require legislative implementation before they may be applied by the courts is in tension with the power-allocating function of the Supremacy clause."); Yoo, *supra* note 24, at 2004 ("[T]he distinction between the power to legislate and the power to make treaties . . . provided Parliament with an important means to check the Crown's power in foreign affairs, one that it gradually used to seize an influential role in the setting of national policy.").

²⁴ See, e.g., Buergenthal, *supra* note **Error! Bookmark not defined.**, at 213, and sources cited therein; John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Colum. L. Rev. 1955, 1996--2000 (1999) (tracing history of Crown's treaty-making power), and sources cited therein. The relationship between the Crown and Parliament with respect to treaties evolved over time, however. Yoo, *supra*, at 2004 n.235 ("Even as a formal matter . . . the Crown's prerogative over treaties itself was no longer absolute by the eighteenth century."). More recently, Australia has undertaken various reforms to ensure more active participation by its parliament in approving treaties prior to ratification by the executive. See Charlesworth et al., *supra* note, at 439--40 (describing 1996 reforms).

Common law dualism also had its philosophical roots in the English positivism school of the seventeenth and eighteenth centuries.²⁵ The positivists rejected the centuries-old monistic view of an integrated, unitary legal system based on shared understandings of natural law principles. Instead, the positivists envisioned a world in which municipal law and the public law of nations operated on separate and distinct horizontal planes.²⁶ The positivists emphasized the sovereignty of nations as an important basis for this distinction between domestic and international law.²⁷ John Austin argued that because international law was not capable of enforcement by sovereign coercion, it amounted to mere “positive international morality.”²⁸ Thus for a court from the dualist tradition, international treaties did not become “real law” until they were legislatively incorporated into domestic law, thus becoming enforceable by courts.

From its inception, the United States legal system departed from strict common law dualism,²⁹ instead adopting a hybrid approach in which some

²⁵ See generally Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *Yale L.J.* 2599, 2608--11 (1997) (book review) [hereinafter Koh, *Why Do Nations Obey*] (identifying early positivist school, which rejected natural law reasoning and asserted that “law of nations” is “law among nations” (internal quotation marks omitted)), and sources cited therein.

²⁶ Jeremy Bentham, for example, underscored the separation between municipal law and the law of nations when he coined the phrase “inter-national jurisprudence” in 1789. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 296--97 (J.H. Burns & H.L.A. Hart eds., 1970) (1789). For a discussion of Bentham’s views on international law, see M.W. Janis, *Jeremy Bentham and the Fashioning of “International Law,”* 78 *Am. J. Int’l L.* 405 *passim* (1984).

²⁷ See Arthur Nussbaum, *A Concise History of the Law of Nations* 172 (rev. ed. 1954) (noting that early positivists such as Thomas Hobbes conceived of “law of nations . . . [as] a law among nations, [which] consists of customs and treaties”); Koh, *Why Do Nations Obey*, *supra* note 25, at 2608--09.

²⁸ John Austin, *The Province of Jurisprudence Determined* 201 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832), at 112 (emphasis and internal quotation marks omitted); see also Koh, *Why Do Nations Obey*, *supra* note 25, at 2608--09 (discussing Austin’s influence).

²⁹ A lively scholarly debate surrounds the intent of the Founders with respect to treaty incorporation. A plain reading of the Supremacy Clause suggests that the Founders intended to depart from the common law tradition, instead adopting a more monistic approach in which treaties enjoy self-executing status within domestic law. See Carlos Manuel Vázquez, *Laughing at Treaties*, 99 *Colum. L. Rev.* 2154, 2169--70 (1999) [hereinafter Vázquez, *Laughing*]. But see John C. Yoo, *supra* note 24, at 1962--67 (arguing that constitutional text can be read to establish that treaties do not “take effect as internal U.S. law” until implemented by federal statute). On the other hand, the records of the Constitutional Convention (and particularly of the ratification debates) indicate that at least some of the Founders intended to adopt the common law’s traditional dualist approach to treaties. See Yoo, *supra* note 24, at 2024--73 (discussing evidence from Constitutional Convention and subsequent ratification debates, and arguing that evidence supports view that Founders intended treaties to be non-self-executing). Early Supreme Court decisions shed little definitive light on the historical controversy. Compare Vázquez, *Treaty-Based Rights*, *supra* note, at 1110--14 (claiming that cases “provide[] additional evidence that framers understood that Supremacy Clause transformed what would otherwise have been merely moral obligations into legal ones enforceable by individuals in courts”), and Jordan J. Paust, *Self-Executing Treaties*, 82 *Am. J. Int’l L.* 760, 766--71 (1988) (reading opinions to mean that “all

treaties enjoy self-executing status while others are treated as non-self-executing.³⁰ By the latter half of the twentieth century, however, the United States had taken a sharply dualist turn with respect to domestic incorporation of human rights treaties.³¹ Since the ratification of the great human rights instruments of the post-World War II era, policymakers have attached non-self-executing declarations to U.S. ratifications of virtually all human rights treaties to which the United States is a party.³² United States courts, for their part, are virtually unanimous in the view that human rights treaty provisions are unenforceable in the courts absent implementing legislation.³³

treaties, to the extent of their grants, guarantees, or obligations, were to be self-executing. Those that were not were those which, by their terms, required domestic implementing legislation.”), with Yoo, *supra* note 24, at 2074--91 (arguing that the Court rejected *Ware*'s rule in *Foster* and “codified the rule of non-self-execution that had originated in the Framing debates”).

³⁰ See Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 *Vand. L. Rev.* 1103, 1104--06 (1990) [hereinafter Steinhardt, *Domestic Statutory Construction*] (arguing that Supreme Court has avoided both dualist and monist extremes in balancing American and international law); Louis Henkin, *Plenary Session: The U.S. Constitution in Its Third Century: Foreign Affairs*, 85 *Am. Soc'y Int'l L. Proc.* 191, 191 (1991) (describing U.S. system as hybrid of monism and dualism).

There exists considerable scholarly debate regarding the location of the United States legal system on the monism-dualism spectrum. On the one hand, Louis Henkin argues that the United States “began with very, very monist dispositions.” Louis Henkin, *Implementation and Compliance: Is Dualism Metastasizing?*, 91 *Am. Soc'y Int'l L. Proc.* 515, 515 (1997) [hereinafter Henkin, *Is Dualism Metastasizing*]. The U.S. Supreme Court's decision one hundred years ago in the *Chinese Exclusion Case*, he claims, represented “the beginnings of a retreat from monism,” and that a dualist approach to international law has “metastasiz[ed]” over the past several decades. See Henkin, *Is Dualism Metastasizing*, *supra*, at 515--18. John Yoo has disputed these claims, arguing that the U.S. legal system has followed a dualist approach to treaties since the Founding. See Yoo, *supra* note, at 1958--62.

³¹ See generally Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 *Harv. L. Rev.* 853, 863--86 (1987) (criticizing U.S. courts for, *inter alia*, stating domestic statutes trump treaties and holding executive action immune from review even if it deviates from international human rights norms); Henkin, *Is Dualism Metastasizing*, *supra* note (positing that U.S. commitment to international law has been weakened by judicial statements claiming that compliance with international law is a moral issue, that Congress's power in international affairs is not limited by Bill of Rights, and that treaties are subject to legislative override).

The non-self-executing status of human rights treaties in the country dates largely from a series of judicial and political developments in the mid-twentieth century. For a comprehensive discussion of historical developments in the United States regarding the non-self-executing status of human rights treaties, see David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 *Yale J. Int'l L.* 129 *passim* (1999).

³² The practice of attaching non-self-executing declarations to U.S. ratification instruments began during the Carter Administration and has been followed in subsequent administrations. See *id.* at 139--42 (describing burgeoning use of reservations, declarations, and understandings when ratifying treaties).

³³ See *id.* at 197--203 (cataloging U.S. cases in which litigants raised claims under certain treaties and finding that “both advocates and judges have failed to appreciate the possibilities for

Thus despite its historical hybrid approach to treaty incorporation, by the latter half of the twentieth century the American legal system shared with its common law counterparts a fairly strict dualist approach to human rights treaties.³⁴ Judges throughout the common law world shared a common understanding that human rights treaties were non-self-executing and required implementing legislation in order to be enforceable in the courts.

Over the last two decades, however, common law dualism has increasingly come into tension with the burgeoning human rights internationalism of the modern era.³⁶ International and regional human rights treaty regimes have proliferated and have become increasingly powerful on the world stage. A host of supranational judicial and quasi-judicial institutions (such as the Human Rights Committee and the European Court of Human Rights) now enjoy supervisory authority over the implementation of human rights treaty obligations in states party to the treaties.³⁷ In exercising that authority, these supranational institutions are increasingly willing to examine domestic legislation for consistency with human rights treaty provisions. By the same token, they are increasingly bold in pointing out treaty violations.

Thus the very structure of the modern human rights treaty regime, with its emphasis on supervisory rulings by supranational institutions, has deepened the need for better domestic enforcement of international human rights treaty obligations. In order to remain in compliance with their international law obligations, states must ensure that human rights treaties – and the rulings of supranational bodies interpreting those treaties – can be quickly and efficiently

judicial appreciation of human rights treaties to which the United States is a party”).

³⁴ See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399, 439--40 (2000) (“U.S. courts . . . treat international and domestic law as distinct, they rely on domestic law to determine international law’s status within the U.S. legal system, and, in case of a conflict, they generally give domestic law primacy over international law.”).

³⁶ See generally Buerghenthal, *supra* note, at 215--20 (describing in detail increasingly internationalist approach of several countries worldwide with respect to human rights issues).

³⁷ The experience of the forty-six member-states of the Council of Europe is a case in point. As parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms, all forty-six member states have largely ceded final judicial review of alleged internal human rights violations to the European Court of Human Rights. See Council of Eur., *Execution of Judgments of the European Court of Human Rights: A Unique and Effective Mechanism*, at http://www.coe.int/T/E/Human_rights/execution/01_introduction/01_Introduction.asp (last visited Oct. 31, 2006) (on file with the *Columbia Law Review*) (describing obligation of signatories to abide by final judgment of court). Member states of the Council of Europe are required to become signatories to the Convention and to accept the compulsory jurisdiction of the Court and the binding effect of its judgments. *Id.*

implemented into domestic law.³⁸ The domestic status of human rights treaties – and the role of domestic courts in implementing them – become crucial in this calculus.

For many countries from the civil law tradition, the need for better domestic enforcement is easily addressed. Heavily influenced by historical monism,³⁹ these countries have addressed the compliance problem by granting higher normative status to human rights treaties than to domestic legislation⁴⁰ – and, in some cases, than to domestic constitutional provisions.⁴¹ For civil law countries whose roots are in a monistic tradition, such a move is perfectly logical. Unlike dualism, the monistic tradition does not draw a sharp distinction between domestic and international law; instead, it tends to view all law as emanating from the same unitary natural law source.⁴² Under this view, international law is automatically incorporated into the domestic legal order. As a result, constitutions in monist-oriented countries traditionally have tended to recognize duly ratified treaties as enjoying the same normative rank as domestic legislation.⁴³ Indeed, to the extent that monism recognizes a distinction between domestic and international law, the predominant strand of monism takes the view that international law is of a higher order and thus trumps conflicting domestic

³⁸ See Buergenthal, *supra* note, at 214.

³⁹ Generally speaking, countries from the civil law tradition tend to be more monist in orientation. See, e.g., Bruno Simma, *The Contribution of Alfred Verdross to the Theory of International Law*, 6 *Eur. J. Int'l L.* 33, 44 (1995) (noting influence of “moderated monism” theory in Netherlands, France, and Austria); Directorate of Int'l Law, Swiss Fed'n, *Relation Between International and Domestic Law*, at http://www.eda.admin.ch/sub_dipl/e/home/thema/intlaw/relat.html (last visited Oct. 31, 2006) (on file with the *Columbia Law Review*) (“The Swiss view of the law can be described as monistic . . .”).

⁴⁰ See Buergenthal, *supra* note, at 216–17 (noting that a number of states have “accord[ed] human rights treaties a special or preferred status with a normative rank higher than that of other treaties and ordinary domestic law.”) In most countries, this has been accomplished through constitutional amendment. See *id.* at 215–16 (discussing constitutional provisions in various countries). A typical example is Article 55 of the French Constitution, which provides, “Treaties or agreements duly ratified and approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party.” 1958 Const. art. 55 (Fr.). In a few countries, constitutional courts have interpreted existing constitutional provisions as granting higher normative status to international law. For example, the Belgian Supreme Court and the Federal Court of Switzerland have adopted this approach. See Buergenthal, *supra* note, at 216.

⁴¹ The Netherlands amended its national constitution in the 1950s to provide that international treaties take precedence over all domestic law, including the constitution itself. See Henry Schermers, *Netherlands*, in *The Effect of Treaties in Domestic Law*, *supra* note, at 109, 112–13, cited in Buergenthal, *supra* note, at 215 n.10.

⁴² See Simma, *supra* note, at PIN (describing monism as being rooted in natural law concepts). See generally D.P. O'Connell, *The Relationship Between International Law and Municipal Law*, in *International Law* 38, 38–42 (describing historical and philosophical origins of monism).

⁴³ See Buergenthal, *supra* note, at 213.

law.⁴⁴ Thus when a domestic court from a monist tradition implements a human rights treaty provision, or relies on the ruling of a supranational tribunal interpreting the treaty, it is acting consistently with a monistic understanding of the proper relationship between international treaties and domestic law.

For domestic courts from the common law tradition, however, the proliferation of human rights treaties and supranational judicial institutions has presented a quandary for judges. On the one hand, human rights advocates urge common law judges to join the internationalist trend by drawing on the rich international human rights jurisprudence emerging from judicial bodies like the Human Rights Committee and the European Court of Human Rights.⁴⁵ Many common law judges agree that, at a minimum, international human rights jurisprudence can be a useful resource in interpreting domestic law provisions.⁴⁶ Other judges are even more ambitious, arguing that common law courts should engage in “an interactive dialogue”⁴⁷ regarding the development of the normative

⁴⁴ See Starke, *supra* note 27.

⁴⁵ See generally Harold Hongju Koh, *Bringing International Law Home*, 35 *Hous. L. Rev.* 623 (1998) [hereinafter Koh, *Bringing International Law Home*] (discussing role of human rights advocates and other “transnational norm entrepreneurs” in internalizing and enforcing international human rights law in domestic legal systems). Human rights advocates argue that reliance on international treaties is logical, given that treaty provisions are often identical or very similar to provisions in domestic constitutions. See, e.g., *id.* at 626--27. Human rights advocates in the United States are supported by an increasing number of international law scholars who advocate a more monistic conception of the relationship between international and domestic law. See Curtis A. Bradley, *Beard*, *Our Dualist Constitution, and the Internationalist Conception*, 51 *Stan. L. Rev.* 529, 531 (1999) [hereinafter Bradley, *Beard*] (describing such commentators as espousing an “internationalist conception” of relationship between domestic and international law). As we shall see, common law courts around the world have adopted several monistic approaches to treaty incorporation advocated by this group of scholars. See discussion *infra* Part II. [good place to cite voluntary school integration cases]

⁴⁶ Justice Sian Elias of the New Zealand Supreme Court, for example, has argued that New Zealand’s adoption of the Optional Protocol to the ICCPR, which gives the Human Rights Committee authority to scrutinize domestic violations of the treaty, obligates the country to utilize the decision of the Human Rights Committee in interpreting the country’s major rights-granting law, the Bill of Rights (BORA). Pointing out that BORA “was adopted to fulfil obligations under international covenants, principally the International Covenant on Civil and Political Rights,” Justice Elias argues:

It would be inconsistent and wasteful for the domestic courts not to draw on the body of thinking being developed by the Human Rights Committee. Just as it is idle to suggest that the domestic courts should not gain what help they can from the decisions of other jurisdictions based on the same foundation. These standards now “march with the common law.”

Sian Elias, Chief Justice of New Zealand, *Judicial Legitimacy and Human Rights: Address to the International Bar Ass’n Conference 2 & n.3* (Oct. 21, 2002) (on file with the *Columbia Law Review*); see also New Zealand Bill of Rights Act 1990, 1990 S.N.Z. No. 109, § 19 (amended 1993) [hereinafter BORA]; Optional Protocol to the International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 171, 302 (entered into force Mar. 23, 1976) [hereinafter Optional Protocol].

⁴⁷ Kirby, *Impact on National Constitutions*, *supra* note 18, at 13; see also *id.* at 14 (“[T]he

content of human rights provisions – a dialogue that over time will “help to merge aspects national and international.”⁴⁸

On the other hand, weighing against the internationalist trend in human rights law is the deep-seated dualist orientation of the common law tradition itself, which suggests that a treaty is not “real law” until it has been legislatively incorporated. Moreover, for the most part national legislatures in common law countries have evinced little interest in enacting implementing legislation for the major human rights treaties. As a result, in the age of human rights internationalism common law courts face a common dilemma: how to make use of international human rights treaties and jurisprudence in their work (thus joining the rich transnational judicial dialogue on human rights law), while remaining true to their historical dualist roots.

B. The Role of Transnational Judicial Dialogue in the Growth of Creeping Monism

Creeping monism is a judicial response to the tension between historical common law dualism and the modern era of human rights internationalism. Over the past two decades, many common law judges have explored the possibility of eroding strict dualism, in favor of a more flexible, monist-oriented approach to human rights treaty incorporation. The interpretive incorporation techniques discussed in Part II are a result of this effort. But judges have not developed these techniques in isolation from one another: Instead, transnational judicial dialogue has played a key role in the emergence of the creeping monism trend. Common law judges have engaged in two kinds of dialogue. First, many judges have participated in “face to face” dialogue,⁴⁹ gathering periodically at international judicial colloquia whose purpose is to explore the implications for common law judges of the growing internationalization of human rights law. Second, judges engage in dialogue through their case law, citing and discussing one another’s opinions in developing monist-oriented techniques for utilizing human rights treaties in their work. I explore examples of both kinds of dialogue below.

1. The Interights Colloquia and the Bangalore Principles

A particularly influential example of face-to-face dialogue has been a series of eight judicial colloquia held from 1988 to 1998, and specifically

‘judicial dialogue’ that is already occurring between such courts and national constitutional courts is one from which the hold-outs should not cut themselves off.”).

⁴⁸ Id. at 13.

⁴⁹ Anne-Marie Slaughter has provided a detailed account of the development and influence of informal communication among the world’s judges in ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 21-23, 96-99 (2004).

convened to address the issue of common law courts' engagement with international human rights law. Organized by Interights (a London-based human rights NGO)⁵⁰ and the British Commonwealth Association (an intergovernmental organization representing fifty-three Commonwealth member states),⁵¹ the colloquia series drew prominent constitutional court justices and lower court judges from throughout the common law world.⁵² Colloquia participants represented thirty-seven countries, as diverse as India, Australia, Zimbabwe, Mauritius, Canada, Belize, Pakistan, Sri Lanka, and the United States.⁵³

The overarching theme of the Interights colloquia series was what one regular participant has termed “the growing rapprochement” between domestic and international human rights law.⁵⁴ A concomitant theme was the role of the domestic judge in encouraging that “rapprochement”---in other words, in using international human rights law to shape domestic legal rules.⁵⁵ Because of its origins as a gathering of judges from the British Commonwealth tradition, a major focus of the colloquia series was the status of unincorporated treaties in dualist-oriented common law legal systems.⁵⁶ Participants at the colloquia devoted considerable attention to the issue of how (if at all) common law judges can utilize treaties that have not been legislatively incorporated into the domestic legal system. They concretized their views on this question into a series of concluding statements that have become known as the Bangalore Principles.

⁵⁰ See generally Interights: The International Centre for the Legal Protection of Human Rights, at <http://www.interights.org> (last visited Oct. 26, 2006).

⁵¹ See generally Commonwealth Secretariat, at <http://www.thecommonwealth.org> (last visited Oct. 26, 2006).

⁵² In fact, Justice (then Judge) Ruth Bader Ginsburg was a participant at the first Interights colloquium, in Bangalore, India in 1988. Other U.S. participants at the colloquia included Judge Betty Fletcher of the Ninth Circuit, Judge Nathaniel R. Jones (formerly of the Sixth Circuit), and Judge Louis Pollak of the Eastern District of Pennsylvania.

⁵³ Judges at the colloquia represented the following countries: Antigua and Barbuda, Australia, Bangladesh, Barbados, Belize, Botswana, Brazil, British Virgin Islands, Canada, Dominica, Gambia, Ghana, Grenada, Guyana, India, Jamaica, Kenya, Lesotho, Malawi, Malaysia, Mauritius, New Zealand, Nigeria, Pakistan, Papua New Guinea, Seychelles, Sierra Leone, South Africa, Sri Lanka, St. Lucia, Tanzania, Trinidad and Tobago, Uganda, the United Kingdom, the United States, Zambia, and Zimbabwe.

⁵⁴ Michael Kirby, Justice of the High Court of Australia, *The Growing Rapprochement [sic] Between International Law and National Law: Essays to Honour His Excellency Judge C.J. Weeramantry*, available at http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_weeram.htm (last visited Oct. 31, 2006) (on file with the *Columbia Law Review*).

⁵⁵ See, e.g., Colloquium, *Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms*, at v (Commonwealth Secretariat ed., 1988) [hereinafter 1988 Colloquium] (noting that discussion at colloquium “focused on recent developments in the common law whereby judges and lawyers generally are beginning to draw on international human rights jurisprudence in order to augment the domestic law of their jurisdictions”).

⁵⁶ See, e.g., Rajsoomer Lallah, *International Human Rights Norms*, in 1988 Colloquium, supra note 55, at Starting page, 20--21 (describing difficulties faced by judges in common law systems based on experience as Mauritius Supreme Court justice).

Over the ten-year period of the judicial colloquia series, the Bangalore Principles evolved toward a significantly more monistic approach to the role of unincorporated treaties in interpreting domestic law. At the first Interights colloquium in 1988, the colloquium participants adopted a fairly conservative approach to this question.⁵⁷ The 1988 Bangalore Principles began with a strong acknowledgment of the traditional limitations imposed on common law courts in dualist-oriented legal systems.⁵⁸ But the statement then noted with approval the erosion of traditional dualist limitations on unincorporated treaties. It cited “a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law---whether constitutional, statute or common law---is uncertain or incomplete.”⁵⁹ The statement applauded the trend, arguing that the erosion of strict dualism is in keeping with the growing recognition of both the universality of international human rights norms and the special role of the judiciary in interpreting and enforcing such norms. It asserted, “This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals . . . with the general interests of the community.”⁶⁰ Judges and lawyers, the statement emphasized, “have a special contribution to make in the administration of justice in fostering universal respect for fundamental human rights and freedoms.”⁶¹

At the same time, the 1988 Bangalore Principles were quick to acknowledge some limitations on common law courts in utilizing international law, and to emphasize the need for courts to be sensitive to the needs and expectations of the domestic polity. The concluding statement noted, “While it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.”⁶²

In the final analysis, the participants at the 1988 Interights colloquium attempted to balance these competing concerns. On the one hand, the 1988 Bangalore Principles asserted that unincorporated treaties could play a kind of gap-filling role in common law systems. On the other hand, the Principles urged judges to remember their obligations as part of the historical common law tradition. The Principles concluded:

⁵⁷ See Bangalore Principles, *in* 1988 Colloquium, *supra* note 55, at ix--x.

⁵⁸ It noted that “[i]n most countries whose legal systems are based upon common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law.” *Id.* at ix.

⁵⁹ *Id.*

⁶⁰ *Id.* at x.

⁶¹ *Id.*

⁶² *Id.*

It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes---whether or not they have been incorporated into domestic law---for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law. . . . However, where national law is clear and inconsistent with the international obligations of the State concerned, in common law countries the national court is obliged to give effect to national law.⁶³

The view expressed in the 1988 Bangalore Principles---that unincorporated treaties could play a gap-filling role in interpreting domestic law---represented a departure from strict common law dualism. For a strict dualist, unincorporated treaties have *no* role to play in the domestic legal system until the legislature enacts implementing legislation. Nevertheless, the participants at this first Interights colloquium clearly saw a need to balance a more monistic approach to treaties with an emphasis on judicial sensitivity to domestic realities. In their view, common law judges should be alert to opportunities to use international human rights law in their work, but also strictly dualist in their approach where domestic law is unambiguously in conflict with international human rights obligations.⁶⁴ Thus while judges at the 1988 colloquium perhaps had begun to conceive of their judicial roles as mediators between international and domestic human rights law, they remained anchored primarily in the needs and requirements of the domestic legal system.

Ten years later, the concluding statement from the 1998 Interights colloquium (also held in Bangalore) revealed a very different judicial conception of the proper relationship between international and domestic human rights law, as well as the judge's role in mediating that relationship.⁶⁵ In the 1998 Bangalore Principles, no longer are international treaties to be used simply to address ambiguities or uncertainties in domestic law. Instead, the statement put forward a much bolder proposition, announcing: "It is the vital duty of [the] judiciary . . . to interpret and apply national constitutions and . . . legislation *in harmony with*

⁶³ Id. Even in fulfilling their traditional obligations to apply national law, however, the colloquium participants envisioned a fairly activist role for domestic courts in helping to ensure domestic compliance with international obligations. The statement asserted that in cases where national law is inconsistent with international obligations, "the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation that is undertaken by a country." Id.

⁶⁴ I discuss the potential role of judges as mediators between domestic and international legal norms in Waters, *supra* note 1, at 499--501.

⁶⁵ See Colloquium, *The Challenge of Bangalore: Making Human Rights a Practical Reality*, in 8 *Developing Human Rights Jurisprudence, Judicial Colloquium, Bangalore* [pin], 267--70 (Commonwealth Secretariat ed., 1998) [hereinafter 1998 Colloquium].

international human rights codes and customary international law, and to develop the common law in the light of the values and principles enshrined in international human rights law.”⁶⁶

The 1998 Bangalore Principles also revealed a significant erosion in judicial deference toward traditional dualist doctrine. Whereas participants at the 1988 colloquium had shown considerable respect for the dualist approach to treaties (and the limitations that it imposed on common law judges), in the 1998 concluding statement common law dualism received barely a mention and no deference whatsoever. The statement simply noted that “even where human rights treaties have not been ratified or incorporated into domestic law, they provide important guidance to law-makers, public officials and the courts.”⁶⁷ Indeed, far from showing deference to legislative primacy over domestic implementation of human rights treaties, the 1998 Bangalore Principles condemned what its drafters viewed as legislative attempts to frustrate judicial enforcement of international human rights law. The statement asserted:

It is a matter of public concern that some legislatures pass amendments to their constitutions or laws designed to erode or diminish fundamental rights and freedoms as interpreted and applied by national courts and by international human rights fora. This practice should not be resorted to and no amendment should be made which would destroy or impair the essential features of democratic societies governed by the rule of law.⁶⁸

Behind this decreased deference for traditional common law dualism is a fundamental shift in philosophy regarding the origins and grounding of human rights law. Compare, for example, the treatment of this issue in the 1988 and 1998 colloquium statements. The 1988 statement emphasized the universality of human rights norms, but it appeared to place both domestic and international legal texts on equal footing as authoritative sources of these norms. It noted, “Fundamental human rights and freedoms are inherent in all humankind and . . . find expression in constitutions and legal systems throughout the world and in the international human rights instruments.”⁶⁹ The 1998 statement, however, drew a distinction between domestic and international legal sources, arguably attributing a higher normative rank to international treaties. In the 1998 statement, human rights norms may “*find expression* in constitutional and legal systems throughout

⁶⁶ Id. at 268 (emphasis added).

⁶⁷ Id.

⁶⁸ Id. at 269.

⁶⁹ 1988 Colloquium, *supra* note 55, at ix.

the world,”⁷⁰ but “they are *anchored* in the international human rights codes to which all genuinely democratic states adhere.”⁷¹

One can also discern an important shift in philosophy regarding the role of domestic courts in internalizing international human rights law. According to the 1988 statement, judges had “a special contribution to make . . . in fostering universal respect for fundamental human rights and freedoms.”⁷² Ten years later, judges had become much more central to the realization of human rights objectives:

Fundamental human rights form part of the public law of every nation, protecting individuals and minorities against the misuse of power by every public authority and any person discharging public functions. It is the special province of judges to see to it that the law’s undertakings are realized in the daily life of the people.⁷³

In the conception of participants at the 1998 colloquium, the common law judge’s role was no longer anchored primarily in the domestic legal system. Instead, judges had become key mediators between the international and domestic human rights regimes. The 1998 statement commented, “The universality of human rights derives from the moral principle of each individual’s personal and equal autonomy and human dignity. *That principle transcends national political systems and is in the keeping of the judiciary.*”⁷⁴

The Bangalore Principles that emerged from the 1998 colloquium were far more monistic in approach than their 1988 predecessors, revealing striking evidence of creeping monism in the development of common law judicial philosophy at the Interights colloquia series. If human rights are truly universal, then they must “transcend national political systems.” In that case, while human rights norms may “find expression” in various domestic constitutions and legal texts, their “anchor”---their origin and true home---is found in international human rights treaties. The implication, then, is that the international law of human rights is the primary, authoritative source for human rights norms: Domestic legal sources are merely derivative of international human rights law. Moreover, if judges enjoy some special status as the “keepers” of the fundamental principles of universal human rights, it is therefore their “vital duty” to harmonize

⁷⁰ 1998 Colloquium, *supra* note 65, at 267 (emphasis added).

⁷¹ *Id.* at 267--68 (emphasis added). The 1998 statement did acknowledge, however, that both domestic and international courts have an important role to play in interpreting fundamental human rights, noting that “their meaning is illuminated by a rich body of case law, both international and national.” *Id.* at 268.

⁷² 1988 Colloquium, *supra* note 55, at ix.

⁷³ 1998 Colloquium, *supra* note 65, at 268.

⁷⁴ *Id.* (emphasis added).

subordinate domestic law with international human rights treaty law---regardless of the formal legal status of treaties within the domestic legal system.⁷⁵

The Bangalore Principles serve as both bellwether and catalyst in the development of creeping monism. A close analysis of the evolving language of the Bangalore Principles reveals creeping monism's evolutionary path over the past two decades or so, toward an increasingly monistic approach to judicial incorporation of international human rights law into common law legal systems. Moreover, the impact of the Bangalore colloquia on some common law judges has been profound. Indeed, Justice Michael Kirby of the Australian High Court described his experience at the 1988 Bangalore colloquium as something akin to a spiritual awakening:

The Bangalore meeting helped to rescue me from the rigid dualism developed by the English common law. . . . [The dualist] viewpoint oversimplified a complex subject. But it was the opinion conventionally held by most common law practitioners at the time. I was one of them. In the course of the Bangalore meeting, the scales were lifted from my eyes by the discovery of the growing role that international law was playing, and could play, in the municipal legal systems of the Commonwealth of Nations.⁷⁶

Justice Kirby and other judges who participated in the early colloquia have become repeat players, presenting papers at subsequent colloquia and even serving as experts at recent Interights-sponsored conferences and judicial training programs espousing the Bangalore Principles.⁷⁷ They also have given speeches at

⁷⁵ Justice Kirby emphasized this point in a speech to the participants at the 1992 Interights colloquium in Harare, Zimbabwe:

International law must be seen not as a remote compilation of high sounding rules, political in character, addressed to governments and not to people. It must be seen rather as the rules of humanity, defined by experts and deriving authority from international agencies and multi-national acceptance. In such a world, it becomes the duty of the judges in domestic courts . . . to endeavour, so far as possible, to bring their decisions into harmony with the developing body of international law.

[cite].

⁷⁶ Kirby, *Impact on National Constitutions*, supra note 18, at 4--5. Justice Kirby has become perhaps the most enthusiastic supporter of the Bangalore Principles, giving speeches worldwide on the issue and relying heavily on the Principles in his work on the Australian High Court. Justice Kirby's many speeches on the Bangalore Principles are available at http://www.hcourt.gov.au/publications_05.html. See also infra Part II (discussing Australian case law).

⁷⁷ For example, Canadian Supreme Court Justice Claire L'Heureux Dubé, Papua New Guinea Chief Justice Mari Kapi, and Australian High Court Justice Michael Kirby served as "international experts" at an Interights-sponsored judicial colloquium in Suva, Fiji, in August 2004. The subject of the conference was "Access to Justice in a Changing World: The Principles of Judicial Independence and Access to Justice." All three justices had attended one or more of

international judicial conferences advocating the need for judicial implementation of the Bangalore Principles.⁷⁸ For these judges, the Bangalore Principles – and the more flexible, monistic approach to treaty incorporation that they espoused – offered a means to resolve the tension between the strictures of historical common law dualism and the demands of the new era of human rights internationalism.

2. Evidence of Creeping Monism in the Jurisprudence of Common Law Courts

If creeping monism merely represented the evolving views of participants at a series of judicial colloquia, the phenomenon might be interesting but not particularly noteworthy. The significance of creeping monism lies in its powerful influence over common law judicial decisionmaking. The Bangalore Principles themselves have been widely disseminated throughout the common law world, and have exercised both direct⁷⁹ and indirect⁸⁰ influence over the development of human rights jurisprudence in several countries. Their influence on the case law is not surprising, given that a significant number of colloquia participants were particularly well positioned to incorporate the monistic approach into their domestic legal regimes. Indeed, the invitation list for the colloquia series was highly selective: Of the hundreds of judges who attended one of the eight colloquia, a substantial percentage were constitutional court or supreme court justices. I view the Interights colloquia and the Bangalore Principles primarily as

the previous Interights colloquia on the domestic application of international human rights norms. [cite] (on file with author).

⁷⁸ [Cite to Kirby speeches, supra note 75.

⁷⁹ For example, the Nigerian Federal High Court relied on the Bangalore Principles in a case dealing with the rights of journalists during national states of emergency, noting that “it is at such times that fundamental human rights are most at risk and that courts must be especially vigilant in their protection.” *Punch Nig. Ltd & Anor v. Attorney-Gen. & Ors*, (Nigeria F.H.C. July 29, 1994), available at <http://www.interights.org/showdoc.php?keywords=punch%20nigeria&dir=databases&refid=2627> (on file with the *Columbia Law Review*) (citation omitted). The Tanzanian High Court cited the Bangalore Principles in holding that attorneys cannot be required to take legal aid cases. *N I N Munuo Ng'uni v. Judge in Charge High Court, Arusha & Anor*, H.C. Civil Case No 3 of 1993 (Tanzania Mar. 17, 1998), available at <http://www.interights.org/showdoc.php?keywords=N%20I%20N%20munuo&dir=databases&refid=2709> (on file with the *Columbia Law Review*) (using Bangalore Principles as well as Universal Declaration of Human Rights and African Charter on Human & People’s Rights to determine that “[a] court should take a liberal approach to rules of practice and procedure where basic rights and freedoms are invoked, so as to give to the complainant a full measure of his or her rights”). For a brief discussion of the colloquia cited by the court, see generally Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?*, 24 *Mich. J. Int’l L.* 103, 126--27 & nn.114--115 (2002).

⁸⁰ An example of the Bangalore Principles’ indirect influence is the development and dissemination of the rights-conscious *Charming Betsy* technique, discussed *supra* text accompanying notes - (discussing *Tavita v. Minister of Immigration*, in which New Zealand Court of Appeal cited Bangalore Principles, and subsequent foreign case law relying on *Tavita*).

⁸² [Cite Kirby, L’Heureux-Dube, Ginsburg].

evidence of a broader trend toward creeping monism, and I do not make a causal claim that creeping monism originated at the colloquia series. Nevertheless, it is certainly noteworthy that some of the most enthusiastic judicial proponents of the use of human rights treaties in shaping domestic law were active participants at one or more colloquia, and that some of those participants have relied explicitly on the Bangalore Principles in their work.⁸²

The most striking evidence of the creeping monism phenomenon is in the case law itself. As I discuss in detail in Part II, the case law demonstrates a significant worldwide trend toward erosion of traditional dualist limitations in favor of a wide variety of monistic judicial incorporation techniques. In some instances, courts cite the Bangalore Principles as support for this approach.⁸³ But regardless of the authorities cited in support, much of the case law shares a common outlook: In the era of human rights internationalism, common law courts can and should find ways to utilize human rights treaties in their work. Judges view the erosion of traditional dualist limitations as a necessary and sensible response to broader shifts taking place internationally. In addition, the case law evidences a concomitant shift in traditional notions of judicial deference to the political branches in matters of treaty compliance---a shift that some judges likewise deem necessary to ensure domestic enforcement of international human rights obligations.⁸⁴

At the same time, a vigorous debate is brewing in several countries over the legitimacy of creeping monism. Decisions by numerous common law courts have been sharply criticized by dissenting justices, and they have been the subject of a considerable political backlash by policymakers and commentators⁸⁵---situations not unlike the one that the United States has witnessed in the wake of *Lawrence*⁸⁶ and *Roper*.⁸⁷ While it is thus an open question to what extent the creeping monism trend will continue to expand, it seems unlikely that a political backlash will completely reverse the well-entrenched judicial trend toward the use of human rights treaties in interpreting domestic law. But as I argue in Parts II and III, judicial techniques for entrenching human rights treaties tend to fall on a

⁸³ See *supra* notes [cite to notes discussing Nigerian case, Tavita case].

⁸⁴ The Australian High Court exemplified this trend in responding to the government's argument that the court could not take into account the CRC because it had not been legislatively implemented: "[R]atification . . . of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instruments evidences internationally accepted standard to be applied by courts . . . in dealing with basic human rights . . ." Minister for Immigration & Ethnic Affairs v. Teoh (1995) 128 A.L.R. 353, 365 (Austl.) (footnote omitted). Instead, the court explained, ratification of a treaty "is a positive statement by the government to the world and to the Australian people that the government will act in accordance with the Convention." *Id.*

⁸⁵ See, e.g., *Baker v. Canada*, [1999] 2 S.C.R. 817, 865--66 (Can.) (dissenting opinion); *Teoh*, 128 A.L.R. at 385--86 (McHugh, J., dissenting).

⁸⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁸⁷ *Roper v. Simmons*, 543 U.S. 551 (2005).

spectrum---from mild, fairly innocuous departures from common law dualism to extreme monistic approaches. In both the United States and the rest of the common law world, well reasoned arguments on both sides of the debate can serve as an important reality check for common law courts in developing sound jurisprudential approaches to respond to the era of human rights internationalism.

II. How Are Courts Using Treaties?: An Empirical Analysis of Interpretive Incorporation Techniques

A narrow lens approach to foreign and international law recognizes that important distinctions exist among the range of specific techniques that courts are applying in utilizing a particular source (in this case, unincorporated human rights treaties). A detailed empirical analysis of existing case law is thus an important ingredient in identifying and assessing available techniques, and in assisting courts to develop a sound jurisprudential approach to foreign and international sources. Moreover, empirical analysis is a crucial first step in exploring the normative questions raised by current judicial trends. As I discuss in Part III, some so-called “interpretive incorporation”⁸⁸ techniques may prove to be well within the ambit of the common law judge’s traditional role, while other, more aggressively monistic techniques may be inappropriate or even illegitimate.⁸⁹

The study presented here explores judicial treatment of human rights treaties in the jurisprudence of the high courts of Australia, Canada, New Zealand, and the United States, as well as the human rights jurisprudence of the British Privy Council in the Commonwealth Caribbean.⁹⁰ It draws on a sample of ninety-two judicial opinions, encompassing all opinions from 2000 to the present that cite the International Covenant on Civil and Political Rights (ICCPR) in analyzing

⁸⁸ The term is Justice Michael Kirby’s. See Kirby, *Impact on National Constitutions*, supra note 18, at 11.

⁸⁹ Moreover, judicial capacity to utilize a particular technique will likely differ from one jurisdiction to the next, given significant differences in structural considerations and in domestic political realities. I address questions regarding the legitimacy of judicial use of unincorporated human rights treaties in Part III, *infra*.

⁹⁰ Some preliminary notes are in order. First, I include case law from the British Privy Council because it currently serves as the court of final instance on constitutional issues for several Caribbean nations who are members of the British Commonwealth. See Council Privy Office, *Judicial Committee Overview*, at <http://www.privy-council.org.uk/output/page5.asp> (last visited Oct. 26, 2006) (on file with the *Columbia Law Review*). Also, the Council’s treatment of international human rights law is particularly interesting and illustrative of broader trends. See *infra* Part II.E (discussing constitutional *Charming Betsy*). Second, I have omitted case law from the United Kingdom from this discussion. In 2000, the United Kingdom legislatively incorporated into law the European Convention on Human Rights, thus providing individuals with legally enforceable rights under the Convention. See Human Rights Act, 1998, c. 42 (U.K.). In so doing, the United Kingdom departed from the common law tradition of strict dualism with respect to human rights treaty obligations, thus rendering the United Kingdom’s modern case law largely irrelevant for purposes of this Article.

a domestic legal provision.⁹¹ As one of the foundational texts of the international human rights legal regime, the ICCPR is one of the most frequently cited human rights treaties in domestic courts.⁹² Its wide-ranging provisions have proven influential across a broad spectrum of civil and political rights issues.

Drawing on the ICCPR sample, I develop a typology of interpretive techniques that courts are utilizing in incorporating human rights treaties into their work.⁹³ In sub-Parts A through E, I identify and assess five techniques: the use of treaties to gild the domestic lily, to develop a rights-conscious *Charming Betsy* canon for statutory interpretation, to update the common law, to engage in “contextual” constitutional interpretation, and to develop a constitutional *Charming Betsy* canon. Sub-Part F provides statistical evidence regarding the rates at which different national courts are utilizing the five interpretive incorporation techniques, as well as their tendencies to favor one technique over another. Part III then builds on this discussion, offering lessons from the case law that U.S. courts can utilize in developing their own jurisprudential approach to human rights treaties: lessons that will help to clarify---and advance---the debate in the United States over the proper role of foreign and international law in U.S. courts.

While the U.S. Supreme Court has thus far restricted its use of human rights treaties to constitutional interpretation,⁹⁴ in other countries courts also utilize treaties in two other contexts: to interpret statutes and to “update” the common law.⁹⁵ All of the interpretive incorporation techniques reflect a strong judicial interest in ensuring that all domestic law---constitutional, statutory, and

⁹¹ I omit from this discussion certain false positives: for example, cases in which a judicial opinion simply mentions in passing that a party or a lower court referenced the ICCPR in its argument or holding. See, e.g., *Moonen v. Film & Literature Bd. of Review*, [2000] 2 N.Z.L.R. 9, 14--15 (C.A.) (noting that Board referenced ICCPR in its decision).

⁹² The common law courts discussed in this Article also frequently cite the Convention on the Rights of the Child. The International Covenant on Economic, Social and Cultural Rights, on the other hand, is cited much less frequently.

⁹³ My work in this regard builds upon the scholarship of Anne-Marie Slaughter and Laurence Helfer. See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *Yale L.J.* 273 *passim* (1997) (using success of European Court of Justice and European Court of Human Rights as framework to analyze prospects for worldwide human rights adjudication); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 *U. Rich. L. Rev.* 99 *passim* (1994) (providing anecdotal survey that suggests growing tendency of courts in various nations to cite precedent from different countries and international tribunals).

⁹⁴ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 575--78 (2005) (referring to international covenants to support interpretation of Eighth Amendment as precluding death penalty for individuals under eighteen years old); *Stanford v. Kentucky*, 492 U.S. 361, 389--90 & n.10 (1989) (Brennan, J., dissenting) (same); *Burger v. Kemp*, 483 U.S. 776, 823--24 & n.5 (1987) (Powell, J., dissenting) (citing international covenants in arguing that Constitution “[a]t least” requires “great care” to be taken “where a State permits the execution of a minor”).

⁹⁵ See *infra* Part II.B (discussing statutory interpretation); Part II.C (explaining how common law is updated).

common law--develops in a manner that takes international human rights norms into account. Thus the techniques find their philosophical roots in the Bangalore Principles' view that, at a minimum, unincorporated human rights treaties can play a kind of gap filling role in interpreting domestic law.⁹⁶

All of the techniques have proven to be very effective means for courts to entrench international human rights obligations into domestic law, but the use of certain interpretive incorporation techniques has sparked considerable controversy. Policymakers (and more jurisprudentially conservative judges) complain that these techniques amount to judicial incorporation of treaty obligations, and thus represent an unacceptable departure from traditional common law dualism and an illegitimate judicial usurpation of what is essentially a political task.⁹⁷ Indeed, in some countries, the use of certain aggressively monistic interpretive incorporation techniques has elevated the controversy to *Roper*-like proportions, with dramatically negative consequences for the courts in those countries.⁹⁸

A. Gilding the Domestic Lily: Human Rights Treaties as Value Added

By far the most common interpretive incorporation technique---indeed, the only one in use in the United States Supreme Court---is the use of human rights treaties to *gild the domestic lily*. In this technique, a court points to international treaty provisions as a kind of value added---that is, as additional support for its own interpretation (based on traditional canons of analysis) of a domestic legal text. Discussion of human rights treaties is not integral to the court's analysis: Indeed, in some cases, discussion of international law is simply tacked on as a sort of afterthought to a detailed discussion of domestic law.⁹⁹ The internal logic of the court's opinion is rooted in domestic sources; for that reason, the integrity of the opinion would stand even if the discussion of treaties were excised entirely.

⁹⁶ See *supra* text accompanying notes 55--74 (discussing Bangalore Principles).

⁹⁷ See, e.g., *infra* text accompanying notes XX--YY.

⁹⁸ See *infra* Part II.E (discussing Privy Council's experience in Commonwealth Caribbean).

⁹⁹ A classic example is *Atkins v. Virginia*, 536 U.S. 304 (2002), in which the Supreme Court held that execution of the mentally retarded violated the Eighth Amendment's prohibition on cruel and unusual punishment. The majority opinion gilded the domestic lily by mentioning in a footnote international law prohibiting execution of the mentally retarded. See *id.* at 316 n.21.

1. *The Technique in Practice*

A simple example of gilding the lily is Justice Ginsburg's concurring opinion in *Grutter v. Bolinger*.¹⁰⁰ In *Grutter*, the Court held that the University of Michigan Law School's consideration of race in its admissions decisions did not violate the Equal Protection Clause. The majority opinion observed, however, that race-conscious affirmative action programs "must have a logical endpoint,"¹⁰¹ and it discussed in depth the Court's case law in support. Justice Ginsburg used human rights treaties to provide additional support for this proposition. She noted that the Court's approach "accords with the international understanding of the office of affirmative action,"¹⁰² and she quoted human rights treaty provisions as evidence of this "international understanding."¹⁰³ Justice Kennedy's opinion in *Roper v. Simmons*, discussed in more detail below, is another (though certainly more controversial) example of the gilding the lily technique.

While the U.S. Supreme Court has restricted its use of the gilding the lily technique to constitutional interpretation,¹⁰⁴ the other courts surveyed here also utilize the technique in interpreting domestic statutes¹⁰⁵ and in developing the common law.¹⁰⁶ Courts have applied the technique to a wide array of legal issues, from campaign finance¹⁰⁷ to public education¹⁰⁸ to double jeopardy¹⁰⁹ to interrogation and confession law.¹¹⁰ The gilding the lily technique has proven to be popular with all of the courts studied for this Article: In total, thirty-one percent of the opinions in the survey employ the technique.¹¹¹

2. *Assessment of the Technique: Why Gild the Lily?*

¹⁰⁰ 539 U.S. 306 (2003).

¹⁰¹ *Id.* at 342.

¹⁰² *Id.* at 344 (Ginsburg, J., concurring).

¹⁰³ *Id.* (quoting provisions in Convention on the Elimination of All Forms of Racial Discrimination (CERD) and Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) that authorize "temporary special measures aimed at accelerating *de facto* equality" that "shall be discontinued when the objectives of equality of opportunity and treatment have been achieved"). The United States has signed, but has not ratified, the CEDAW.

¹⁰⁴ Examples of the gilding the lily technique to interpret constitutional texts abound in the death penalty jurisprudence of many countries. See generally Waters, *supra* note 1, at 505--29 (discussing transnational judicial dialogue in worldwide death penalty jurisprudence).

¹⁰⁵ See, e.g., *R. v. Oran*, [2003] 20 C.R.N.Z. 87, 93 (C.A.).

¹⁰⁶ See, e.g., *Harriton v. Stephens* (2006) 226 A.L.R. 391, 418 n.215 (Austl.) (Kirby, J., dissenting).

¹⁰⁷ See *Canada v. Harper*, [2004] 1 S.C.R. 827, 842 n.18 (Can.) (McLachlin, J., dissenting).

¹⁰⁸ See *Chamberlain v. Surrey Sch. Dist.*, [2002] 4 S.C.R. 710, 715--16 (Can.) (Gonthier & Bastarache, JJ., dissenting).

¹⁰⁹ See *The Queen v. Stephens*, [2003] NZCA 57 (C.A.).

¹¹⁰ See *The Queen v. Whareumu*, [2000] 1 N.Z.L.R. 655, 659 (C.A.).

¹¹¹ See *infra* text accompanying note [] (Fig. 2)

The popularity of the gilding the lily technique begs an important question as to why a court would bother to cite and discuss human rights treaties that are not essential to a court's interpretive work, but are merely serving as a kind of value-added. Some commentators have suggested that such citations are either "purely ornamental"¹¹² window dressing, or may be intended as a kind of shout out to other courts to express respect for international law.¹¹³ While the ICCPR survey presented in this Article provides support for these assertions, it also suggests at least two additional rationales behind courts' gilding of the domestic lily.¹¹⁴

The first rationale is based on a particularly intriguing use of the ICCPR as a sort of foundational human rights text for the community of nations as a whole.¹¹⁵ In this conception, courts view their nation's ratification of the treaty as an acknowledgment of membership in the broader international human rights community.¹¹⁶ Thus gilding the domestic lily with ICCPR citations may serve as a powerful signaling device of a court's willingness to participate in transnational judicial dialogue on human rights issues.¹¹⁷ Indeed, a crucial component in that

¹¹² Young, *supra* note 1, at 154.

¹¹³ *Id.* at 154--55. See also Tim Wu, Foreign Exchange: Should the Supreme Court Care What Other Countries Think?, *Slate*, Apr. 9, 2004, at <http://slate.msn.com/id/2098559> (on file with the *Columbia Law Review*) ("Judges are not unlike rappers and bloggers: They like to pay their respects.").

¹¹⁴ A third rationale for gilding the lily is simply to acknowledge that a particular domestic legal provision has its origins in international human rights law. For example, both the New Zealand and Canadian high courts have acknowledged that their countries' foundational human rights texts---both enacted within the last twenty-five years---trace their origins to the ICCPR. See, e.g., *Canada v. Harper*, [2004] 1 S.C.R. 827, 842 n.18 (Can.) (McLachlin, J., dissenting) (noting in third-party campaign financing case that Canadian "right to receive information is enshrined in both the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights"); *R. v. Oran*, [2003] 20 C.R.N.Z. 87, 93 (C.A.) (noting that criminal statutory provision at issue "was regarded as bringing New Zealand into compliance with its obligations under . . . [the ICCPR]"); see also ICCPR, *supra* note 11; Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 2(d) (U.K.) [hereinafter *Canadian Charter*]; BORA, *supra* note 46. Courts in both countries regard these statutes as foundational human rights texts, as neither country has a bill of rights incorporated into its constitution. See [add cites]. An express purpose of New Zealand's BORA, as stated in its preamble, is "[to] affirm New Zealand's commitment to the International Covenant on Civil and Political Rights." BORA *supra* note 46, pmb. (b).

¹¹⁵ See, e.g., *The Queen v. Whareumu*, [2000] 1 N.Z.L.R. 655, 659 (C.A.) (upholding police practices regarding confession partially on ground of similarity to practices of several other countries, "all of which are also parties to the ICCPR").

¹¹⁶ This view is particularly pronounced among judges in Australia, Canada, and New Zealand, which have ratified the Optional Protocol to the ICCPR granting citizens the right to petition the United Nations Human Rights Committee for redress of government violations of their rights under the treaty. See *Optional Protocol*, *supra* note 46.

¹¹⁷ Cf. Sandra Day O'Connor, *Assoc. Justice, U.S. Supreme Court, Remarks to the Southern Center for International Studies 1--2* (Oct. 28, 2003), available at http://www.southerncenter.org/OConnor_transcript.pdf (on file with the *Columbia Law Review*) (arguing that citation to foreign and international law "will create that all-important good

dialogue is the convergence of common human rights norms in treaty law and national constitutions.¹¹⁸ The ICCPR, as a shared foundational text, can serve as a crucial bridge between disparate national constitutions and domestic human rights legislation, thus promoting this transborder dialogue on human rights.¹¹⁹

A second rationale for gilding the lily is the use of the ICCPR as a subtle means to give additional heft to an argument based on domestic legal sources. This use takes two forms. First, judges may utilize a treaty provision for *emphasis*: that is, to emphasize the importance or fundamental character of a particular domestic norm---for example, a constitutional prohibition on double jeopardy.¹²⁰ Second, and more controversially, courts sometimes rely on the ICCPR as *confirmation*: that is, to confirm the correctness of a legal conclusion drawn from analysis of domestic legal sources. In this latter category, citation to international law may still amount to window dressing, if the domestic legal analysis is strong enough to stand on its own without the confirmation of international law.¹²¹ But in some cases, international law is in fact doing considerable work as a kind of buttress: Gilding the lily with citations to international law serves to shore up what would otherwise be a shaky argument, if based on domestic sources alone.

Indeed, the most problematic aspect of the gilding the lily technique is that it is extraordinarily difficult to identify those cases in which the “confirming”

impression,” and explaining that “[w]hen U.S. courts are seen to be cognizant of other judicial systems, our ability to act as a rule-of-law model for other nations will be enhanced”).

Justice Kirby of the Australian High Court---who has cited the ICCPR in forty-nine cases over the past five years and is a regular on the international human rights lecture circuit---is perhaps the quintessential example of a judge utilizing the ICCPR as a means to signal enthusiasm for transnational judicial dialogue on human rights. See generally High Court of Austl., Current Members of the High Court: Justice Kirby, at <http://www.hcourt.gov.au/kirbyj.htm> (last visited Nov. 1, 2006) (on file with the *Columbia Law Review*) (listing the “numerous national and international positions” Justice Kirby has held).

¹¹⁸ I have considered elsewhere the potential of judicial citation to international law as a kind of signaling device, see Waters, *supra* note 1, at 570, and of human rights treaty law as shared foundational texts, see *id.* at 508.

¹¹⁹ See *infra* text accompanying notes 183--188 (noting that in *Charming Betsy* technique ICCPR is used as bridge between domestic statutory law and “soft” international legal norms).

¹²⁰ See *The Queen v. Stephens*, [2003] NZCA 57 (C.A.) (discussing domestic law prohibiting double jeopardy, but also citing ICCPR, *inter alia*, in noting “universal diffidence about double jeopardy”); see also *Chamberlain v. Surrey Sch. Dist.*, [2002] 4 S.C.R. 710, 715--16 (Can.) (Gonthier & Bastarache, JJ., dissenting) (emphasizing, in case involving censorship of school textbooks discussing same sex parent families, that Canadian High Court’s commitment to parental rights involving religious and moral education of children “is consistent with” ICCPR guarantees of same).

¹²¹ For example, Justice Ginsburg’s citation to human rights treaties in *Grutter*---confirming the Court’s conclusion that affirmative action must have a “logical endpoint”---was largely window dressing. See *supra* text accompanying notes 100--103 (discussing *Grutter*).

¹²³ *Roper v. Simmons*, 543 U.S. 551, 575--78 (2005) (discussing overwhelming opposition to juvenile death penalty in international law as support for decision).

work of international law amounts to mere window dressing, and when is it instead serving as a buttress for an otherwise weak legal argument. The answer to this question is very much in the eye of the beholder, as the debate over Justice Kennedy's use of international law in *Roper v. Simmons*¹²³ illustrates.¹²⁴ In *Roper*, six Justices agreed that foreign and international authority can play a *confirmatory* role in constitutional interpretation.¹²⁵ Justice Kennedy, writing for the majority, cited the ICCPR and other human rights treaties as evidence of an international consensus prohibiting the juvenile death penalty.¹²⁶ He asserted that such a consensus, "while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."¹²⁷ Justice O'Connor agreed, noting that "the existence of an international consensus . . . can serve to confirm the reasonableness of a consonant and genuine American consensus."¹²⁸

But *Roper's* use of international law to gild the domestic lily begs two questions. First, if international law merely plays a confirmatory role, it is not clear why the Court would bother to discuss it at all. Setting aside its possible value as a signaling device, a true "confirmatory" approach ascribes so little weight to international legal sources that it is doubtful whether it merits the time and energy that a court must expend in researching the relevant international sources. Moreover, as I have argued elsewhere, consideration of international norms is useful not only when those norms confirm the reasonableness of domestic norms.¹²⁹ Indeed, *conflicting* international norms may be even more instructive, by calling into question the reasonableness of a domestic norm.¹³⁰

Second, Justice Kennedy's gilding of the lily begs the question whether a "genuine American consensus" against the juvenile death penalty really existed, or whether Justice Kennedy was in fact using international law as a buttress to prop up weak evidence of a domestic consensus. Professor Ernest Young has argued the latter, complaining,

Justice Kennedy's claim that a domestic consensus rejected the juvenile death penalty was profoundly implausible given that twenty states retained the practice. But by shifting focus from the domestic to the

¹²⁴ Cf. Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 Harv. L. Rev. 129, 129 (2005) ("One of the frustrating things about *Roper*, however, is that no one on the Court bothered to articulate a general theory of the citation and authority of foreign law.").

¹²⁵ *Roper*, 543 U.S. at 554, 578.

¹²⁶ *Id.* at 576.

¹²⁷ *Id.* at 578.

¹²⁸ *Id.* at 605 (O'Connor, J., dissenting).

¹²⁹ See Waters, *supra* note 1, at 570.

¹³⁰ Justice Scalia emphasized this point in his dissent, disagreeing with Justice O'Connor's assertion that international materials can confirm the reasonableness of an American consensus: "Surely not unless it can also demonstrate the *unreasonableness* of such a consensus. Either America's principles are its own, or they follow the world; one cannot have it both ways." *Roper*, 543 U.S. at 627 n.9 (Scalia, J., dissenting) (citation omitted).

international plane---where the United States stood as one jurisdiction against all the rest---the *Roper* majority made an implausible claim of consensus into a plausible one.¹³¹

Thus, Young argues, Justice Kennedy did not rely on international law as a kind of persuasive authority, as his supporters have claimed.¹³² Instead, his “confirmatory” approach gives a kind of “authoritative legal weight” to human rights treaty law as evidence of international practice---and ultimately treats such law as “binding legal authority.”¹³³ Justice Scalia agreed, complaining, “‘Acknowledgment’ of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment*---which is surely what it parades as today.”¹³⁴

This criticism of *Roper's* “confirmatory” approach illustrates one of the difficulties inherent in courts’ gilding of the domestic lily: Courts’ rationales for gilding the lily are so many, and so varied, that it is extraordinarily difficult to parse out the rationale in any given case---much less to assess the normative value of the technique in a meaningful way. Citation to international human rights law may indeed be harmless window dressing, or it may be signaling a judicial desire to engage in dialogue with a broader international judicial community. But in borderline cases, where evidence drawn from traditional domestic sources leaves something to be desired, courts who gild the lily will inevitably become the targets of criticism that they are engaging in a jurisprudential sleight of hand---using international law to buttress a shaky domestic foundation.

B. Entrenching Human Rights Treaties into Statutes: A Rights Conscious Charming Betsy Principle

A second interpretive incorporation technique transforms a centuries-old canon of statutory construction---the *Charming Betsy*¹³⁵ principle---into an

¹³¹ Young, *supra* note 1, at 148--49 (internal quotation marks omitted); see also *Roper*, 543 U.S. at 574--75 (holding that objective data indicated nationwide “consensus against the juvenile death penalty” and noting “the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty”). Justice O’Connor found the claim implausible as well: She argued that no national consensus against the juvenile death penalty existed, and she accordingly refused to assign a confirmatory role to international law. See *id.* at 604 (O’Connor, J., dissenting).

¹³² Compare Young, *supra* note 1, at 149, with O’Connor, *supra* note 117, at 1--2 (arguing that “conclusions reached by other countries and by the international community, although not formally binding upon our decisions, should at times constitute persuasive authority in American courts”).

¹³³ Young, *supra* note 1, at 149, 151, 155.

¹³⁴ *Roper*, 543 U.S. at 628 (Scalia, J., dissenting).

¹³⁵ In *Murray v. The Schooner Charming Betsy*, the U.S. Supreme Court held that “an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.” 6 U.S. (2 Cranch) 64, 118 (1804).

extraordinarily powerful judicial tool for entrenching international human rights obligations into domestic law. Under *Charming Betsy*, U.S. courts construe ambiguous federal statutes in such a manner that they would not violate either U.S. treaty obligations or customary international law.¹³⁶ Courts in other common law countries have long had their own analogues to the *Charming Betsy* principle.¹³⁷

As international law (particularly in the human rights arena) has evolved and expanded, so too has the *Charming Betsy* principle. The ICCPR survey indicates that some common law courts are developing a “rights conscious” *Charming Betsy* principle – one that serves as a flexible, powerful, but increasingly controversial judicial tool for entrenching human rights treaty obligations into domestic statutory law.¹³⁸ Historically, the *Charming Betsy* principle was limited in application to narrow jurisdictional questions such as the extraterritorial reach of domestic statutes.¹³⁹ Today’s common law courts use a more expansive *Charming Betsy* principle not only to decide jurisdictional questions, but to utilize human rights treaties to inform the *substantive* content of domestic statutes.¹⁴⁰

Moreover, whereas the traditional application accommodated both dualist and monist paradigms, the emerging rights-conscious *Charming Betsy* principle is considerably more monist in orientation than its historical predecessor. As traditionally applied, the *Charming Betsy* principle fits well within both dualist and monist paradigms.¹⁴¹ From a monistic standpoint, the canon emphasizes

¹³⁶ See *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (articulating modern *Charming Betsy* canon); see also Restatement (Third) of the Foreign Relations Law of the United States § 114 (1990) (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”).

¹³⁷ See, e.g., *Puli’uvea v. Removal Review Auth.*, [1996] 3 N.Z.L.R. 538, 542 (C.A.) (“[T]he Court should strive to interpret legislation consistently with the treaty obligations of New Zealand.” (citation omitted)). As one commentator notes, in New Zealand “[t]he result is that interpretation by reference to treaty law is no longer optional, but required, unless the domestic statute is unambiguously incompatible with the treaty obligation.” Andrew S. Butler et al., *The Judicial Use of International Human Rights Law in New Zealand*, 29 *Vict. U. Wellington L. Rev.* 173, 178 (1999).

¹³⁸ Professor Curt Bradley, for example, has complained that these changes have the potential to transform the traditional statutory canon into an effective “mandate for court-supervised incorporation of international law.” Bradley, *Breard*, *supra* note 45, at 547.

¹³⁹ See Steinhardt, *Domestic Statutory Construction*, *supra* note, at 1111.

¹⁴⁰ See *id.* at 1161--62 (“[T]he principle is not limited to jurisdictional considerations or to accommodating overlaps in nations’ respective spheres of legislative competence. Instead, it operates to inform the substantive interpretation of federal statutes.”).

¹⁴¹ See Bradley, *Breard*, *supra* note 45, 546--47 (“As traditionally applied, the *Charming Betsy* canon fits well with the dualist approach to the relationship between international law and U.S. domestic law.”); Steinhardt, *Domestic Statutory Construction*, *supra* note, at 1127--34 (observing that *Charming Betsy* “principle is essentially bivalent: international law must be observed, and the United States must not be embarrassed in its foreign affairs, suggesting the

respect for international law: As Professor Ralph Steinhardt has commented, it “places the courts . . . in a position of oversight to avoid the possibility of international liability for the country as a whole.”¹⁴² For the dualist, on the other hand, the *Charming Betsy* principle emphasizes respect for the political branches, particularly the legislature: It is “a restrictive and prophylactic doctrine protecting the separation of powers.”¹⁴³ By seeking to read domestic legislation consistently with international commitments undertaken by the political branches, a court employing the traditional *Charming Betsy* principle can ensure that its government is not compromised or embarrassed in the foreign affairs arena.¹⁴⁴ A court employing the emerging rights-conscious *Charming Betsy* principle, on the other hand, exhibits considerably less deference to political branch prerogatives in treaty incorporation, and considerably more interest in ensuring that its government lives up to its international human rights treaty obligations.

1. The Technique in Practice--- Two cases from the New Zealand Court of Appeal illustrate the emergence of a rights conscious *Charming Betsy* principle. The New Zealand court first articulated the principle in a landmark decision applying the ICCPR to New Zealand’s immigration statutes. In *Tavita v. Minister of Immigration*,¹⁴⁵ the court held that the New Zealand Minister of Immigration had an obligation to take the ICCPR and the CRC into consideration in exercising his statutory authority under the New Zealand Immigration Act.¹⁴⁶ Tavita faced deportation but had a child who would remain in New Zealand.¹⁴⁷ The Minister had refused to exercise his discretion under the Act to cancel the deportation order on humanitarian grounds.¹⁴⁸ Tavita argued that both the ICCPR and the CRC required the Minister to make the best interests of the child a primary consideration in exercising its discretion under the statute.¹⁴⁹ Relying on New Zealand’s traditional dualist approach to treaties, the Minister argued that he was not obligated to take these treaty provisions into account because neither the ICCPR nor the CRC had been legislatively incorporated into domestic law.¹⁵⁰

The *Tavita* court strongly rejected the government’s dualist argument, calling it “an unattractive argument, apparently implying that

application of international law when that is tenable and the repudiation of such norms when that is inescapable”).

¹⁴² Steinhardt, Domestic Statutory Construction, *supra* note, at 1128.

¹⁴³ *Id.* at 1130.

¹⁴⁴ *Id.* Both the monist and dualist strands are evident in U.S. Supreme Court case law interpreting the *Charming Betsy* principle. See *id.* at 1130--32 & n.114 (discussing dualist and monist strands in *Weinberger*, 456 U.S. 25, and *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963)).

¹⁴⁵ [1994] 2 N.Z.L.R. 257 (C.A.).

¹⁴⁶ *Id.* at 266.

¹⁴⁷ *Id.* at 259.

¹⁴⁸ *Id.* at 259, 261.

¹⁴⁹ *Id.* at 261--62.

¹⁵⁰ See *id.* at 265.

New Zealand's adherence to international instruments has been at least partly window dressing."¹⁵¹ Ignoring an earlier immigration decision in which it had acknowledged strict dualist limitations on human rights treaties,¹⁵² the court stated that administrative decisionmakers have an obligation to give consideration to human rights treaty obligations regardless of the formal domestic legal status of the treaties in question. It explained that administrators' failure to do so would attract international criticism: Such criticism, moreover, could extend to the New Zealand courts if they were to accept the government's argument that administrative decisionmakers were free to ignore New Zealand's human rights obligations simply because the statute in question did not specifically mention those obligations.¹⁵³

In place of a strict adherence to dualist limitations, the New Zealand court substituted what it would later call a "rights conscious" approach to statutory interpretation.¹⁵⁴ Emphasizing "the duty of the judiciary to interpret and apply national constitutions, ordinary legislation and the common law in the light of the universality of human rights,"¹⁵⁵ the court remanded the case to the immigration authority to reconsider its decision, this time taking into account the relevant international human rights instruments.¹⁵⁶

¹⁵¹ Id. at 266.

¹⁵² In *Ashby v. Minister of Immigration*, [1981] 1 N.Z.L.R. 222 (C.A.), the Court of Appeal had held that judicial review of administrative decisionmaking in immigration cases was extremely limited. It explained that it was only when a statute "expressly or by implication identifies a consideration as one to which regard *must* be had that the Courts can interfere for failure to take it into account." Id. at 225. It also acknowledged the "elementary" dualist proposition that "international treaty obligations are not binding in domestic law until they have become incorporated" by statute. Id. at 224. Combining these two propositions, the court held that even in cases where immigration officials had failed to take New Zealand's international human rights obligations into account in exercising their statutory discretion, traditional dualist limitations generally prevented judicial review of their actions. Id. at 226. A few members of the court left open the possibility that some international obligations "might be of such overwhelming or manifest importance that the Courts might hold that Parliament could not possibly have meant to allow [them] to be ignored." Id.

¹⁵³ *Tavita*, [1994] 2 N.Z.L.R. at 266. The court also relied heavily on New Zealand's recent accession to the Optional Protocol, supra note 46, which gives New Zealand citizens the right to petition the United Nations Human Rights Committee for redress of human rights violations by the New Zealand government. The *Tavita* court commented: "[S]ince New Zealand's accession to the Optional Protocol, the . . . Human Rights Committee is in a sense part of the country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it." *Tavita*, [1994] 2 N.Z.L.R. at 266.

¹⁵⁴ See *Hemmes v. Young*, [2005] 2 N.Z.L.R. 775, 767, 776--77 (C.A.) (articulating "rights conscious" approach).

¹⁵⁵ *Tavita*, [1994] 2 N.Z.L.R. at 266.

¹⁵⁶ *Hemmes*, [2005] 2 N.Z.L.R. at 777--78. The court left open the much more difficult issue of the weight to be given to international obligations in assessing administrative decisionmaking. Indeed, it is not clear from the court's opinion whether administrative officials are required to conform their decisions to the requirements of international human rights law, or if

Eight years after *Tavita*, the New Zealand Court of Appeal spelled out more clearly its rights conscious approach to utilizing the ICCPR in interpreting domestic statutes. In *Hemmes v. Young*, the plaintiff, who had been adopted, sought a determination declaring the defendant to be his biological father.¹⁵⁷ At issue was the construction of a 1955 adoption statute terminating the adopted child's relationship with the biological parents "for all purposes."¹⁵⁸ The defendant argued that the adoption statute "stripped away" any entitlement that the plaintiff might have had, prior to adoption, to obtain a paternity declaration from his biological father.¹⁵⁹

The *Hemmes* court utilized a "human rights-conscious" approach to the ICCPR to update what it described as an "elderly"¹⁶⁰ statute. It noted that there were "two possible solutions One is to regard the language of . . . the Adoption Act as being intractable, in the sense that the words 'for all purposes' mean absolutely literally what they say A second approach is to recognise that this is a situation in which a statute which is nearly half a century old has been caught in something of a time warp" ¹⁶¹ The court asserted that "[i]f there is room for more than one reading then manifestly it should be read consistently with later statutes having human rights dimensions."¹⁶²

The problem, however---as the court acknowledged---was that later human rights statutes did not offer the plaintiff any protection. A 1985 Adoption

it is sufficient that they take into account human rights obligations. While the Court of Appeal has not yet fully addressed these important issues, it has suggested that it will not adopt an overly formalistic approach. See, e.g., *Puli'uvea v. Removal Review Auth.*, [1996] 3 N.Z.L.R. 538, 542 (C.A.) (holding that, where immigration officials had in fact taken into account same kinds of considerations required by ICCPR and CROC, failure to discuss actual texts of treaties did not render deportation order invalid); see also *Butler et al.*, supra note 137, at 182 n.42 (noting that subsequent case law suggests that *Tavita* "requires consideration of international human rights obligations in substance rather than in form").

The Court of Appeal's decision in *Tavita* has had a profound impact on New Zealand immigration policy. In response, the immigration authority overhauled its administrative guidelines to ensure that immigration officials take into account New Zealand's human rights treaty obligations. See *Rowan*, supra note XX, at 3. The new guidelines explicitly acknowledge New Zealand's obligations under the ICCPR and the CRC, and require immigration officials to give substantial weight to these obligations in deportation proceedings. See *Butler et al.*, supra note 137, at 181--82.

¹⁵⁷ [2005] 2 N.Z.L.R. 755.

¹⁵⁸ See *id.* at 758--59. The statute reads in part: "[F]or all purposes, whether civil, criminal, or otherwise, . . . [t]he adopted child shall be deemed to cease to be the child of his existing parents . . . and the existing parents of the adopted child shall be deemed to cease to be his parents" Adoption Act 1955, ch. 16, § 2 (N.Z.).

¹⁵⁹ *Hemmes*, [2005] 2 N.Z.L.R. at 759.

¹⁶⁰ *Id.* at 767, 776.

¹⁶¹ *Id.* at 776.

¹⁶² *Id.* at 767.

Information Act granted certain adoptees the right to learn their genetic origins, but deliberately excluded those in the plaintiff's position.¹⁶³ Nor did New Zealand's foundational human rights legislation, the 1990 Bill of Rights Act (BORA), apply: The Court of Appeal held that its nondiscrimination provisions could not be read to encompass discrimination based on adoption status.¹⁶⁴

Having found what it clearly viewed as unfortunate gaps in domestic statutory protection for adoptees,¹⁶⁵ the *Hemmes* court turned to international law--through a rights conscious application of the *Charming Betsy* principle--to fill those gaps.¹⁶⁶ The court found relief for the plaintiff in the nondiscrimination provisions of the ICCPR, which were broader and more general than the nondiscrimination provisions in New Zealand's BORA.¹⁶⁷ Unlike the BORA, Article 26 of the ICCPR prohibits discrimination based on "birth or other status,"¹⁶⁸ and the court determined (based on scant evidence) that "other status" should be read to include adoptees.¹⁶⁹ The court then applied the *Charming Betsy*

¹⁶³ According to the court, it was clear from the legislative history "that Parliament intended . . . that the birth parents of children adopted prior to 1 March 1986 should be permitted to remain anonymous, should they wish to do so, as something of a compromise." *Id.* at 769.

¹⁶⁴ The BORA effectively prohibits discrimination on the ground of family status by banning discrimination on grounds outlawed by the Human Rights Act, which, in turn, prohibits discrimination based on the ground of family status. See BORA, *supra* note 46, § 19; Human Rights Act 1993, § 21. The *Hemmes* court, however, held that "the status of being adopted does not fall within the 'family status' ground . . . and is not therefore covered." [2005] 2 N.Z.L.R. at 773.

¹⁶⁵ For example, the court described the gap in the BORA's nondiscrimination provisions as "an unfortunate example of a problem which frequently arises with over-particularised human rights legislation: too often it ends up being underinclusive." [2005] 2 N.Z.L.R. at 773.

¹⁶⁶ See *id.* The court asserted that such an approach was consistent with the BORA itself, pointing out that the BORA provides that "[a]n existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part." *Id.*

Before proceeding with its analysis of the ICCPR's nondiscrimination provisions, the court first examined the ICCPR and other international human rights law to ascertain whether there was under customary international law "a stand alone 'right to know' one's genetic origins." *Id.* The court concluded "that international instruments, practice and jurisprudence have not yet reached the point where it can conclusively be said that adopted children possess a universal and internationally recognised right to know their biological parentage, although the tide of opinion is flowing in that direction." *Id.* at 772.

¹⁶⁷ See *id.* at 774--75.

¹⁶⁸ Article 26 provides in part: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . birth or other status." ICCPR, *supra* note 11, art. 26.

¹⁶⁹ *Hemmes*, [2005] 2 N.Z.L.R. at 775. In fact, the court provided scant evidence that Article 26 applied to adoptees. It found "instructive" the views of two scholars who had argued that adoptees should be viewed as a "suspect classification" and thus entitled to protection. *Id.* The Court then made the somewhat conclusory assertion that under Article 26, "discrimination on the ground of birth is prohibited, as is discrimination against illegitimate children. It should also be impermissible under the Covenant to discriminate against someone on the ground that they are

principle to the 1955 adoption statute: Because any distinction between adoptees and nonadoptees in paternity determinations would violate the ICCPR's nondiscrimination provisions (as just interpreted by the court), the statute should be given a "rights-conscious reading" that would avoid such discrimination.¹⁷⁰

Thus the *Hemmes* court utilized a rights conscious *Charming Betsy* principle not only to "update" an older statute, but also to fill perceived gaps in domestic human rights legislation. The court justified its approach by asserting that while "[i]t is not open to a Judge of this (or any) Court to usurp the political function[,] . . . what the Court does have to do, is to endeavour to harmonise the law, and make it work efficiently and justly, where several statutes or instruments intersect."¹⁷¹ Moreover, where so-called "demarcation" issues arise between various legal instruments, the court argued, "Parliament cannot be expected to anticipate where all the rubs will come. Courts do have an ameliorating role in such cases."¹⁷² Finally, the court suggested that New Zealand's human rights legislation itself had become caught in a time warp and thus was ripe for a rights conscious reading of its own.¹⁷³

As the New Zealand case law makes clear, the emerging rights conscious *Charming Betsy* principle is both a product of, and a catalyst in, the emerging transnational judicial dialogue on human rights among the world's common law judges. The landmark *Tavita* decision, for example, was heavily influenced by the monist-oriented ideals of the Interights colloquia and its Bangalore Principles.¹⁷⁴ Moreover, *Tavita's* rights conscious approach has proven enormously influential not only in New Zealand but throughout the common law world, and the decision is widely cited by constitutional courts in Canada,¹⁷⁵

an adoptee." Id.

¹⁷⁰ Id. at 776--77. The court concluded that the adoption statute's termination of the biological relationship "can be read absolutely literally---that 'for all purposes' means 'everything'. Or [it] can be read as meaning (only) for all purposes of legal status A rights-conscious reading---and one which also recognises the reality of human needs---supports that reading." Id. at 777.

¹⁷¹ Id. at 776--77.

¹⁷² Id. at 777.

¹⁷³ It pointed out that the 1985 Adoption Information Act was enacted "prior to the enormous strides in human rights law over the last twenty years. . . . It is difficult to see how Parliament could have countenanced the distinction made against [the plaintiff] in light of these more recent advances in human rights law." Id.

¹⁷⁴ The *Tavita* court cited as support for its views the concluding statements of two of the Interights colloquia (the Balliol and Bloemfontein statements). See *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257, 266 (C.A.). Both of these statements drew heavily on the 1988 Bangalore Principles.

¹⁷⁵ See, e.g., *Baker v. Canada*, [1999] 2 S.C.R. 817, 817, 861 (Can.) (citing *Tavita* in utilizing CRC to interpret Canadian immigration statute for proposition that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation," despite fact that CRC had not been legislatively implemented and thus had "no direct application within Canadian law")

Australia,¹⁷⁶ the United Kingdom, and the Privy Council.¹⁷⁷ The rights-conscious approach articulated in *Tavita* has even found its way into recent U.S. jurisprudence on the *Charming Betsy* principle.¹⁷⁸ As the statistical survey presented in Part II.F indicates, all of the courts studied utilize some version of the rights-conscious *Charming Betsy* principle. In total, twenty-nine percent of the opinions studied utilize the technique, rendering the rights-conscious *Charming Betsy* canon second only to the gilding the lily technique in frequency of use.¹⁷⁹

2. Assessment of the Technique: Treaties as Bridges to Incorporation of Soft Law into Statutory Regimes--- A particularly striking feature of the emerging rights conscious *Charming Betsy* principle is the expansive role that international treaties are playing in statutory interpretation. In some cases, at issue is a fairly specific treaty obligation whose application to domestic legislation is straightforward: for example, the ICCPR's prohibition on retroactive criminal penalties,¹⁸⁰ or the CRC's requirement that the best interests of the child be "a primary consideration" in administrative decisionmaking.¹⁸¹ A somewhat more unusual---and controversial---practice is the use of treaties as evidence of a specific customary international law obligation: This practice enables courts to read statutes consistently with treaties that have not been ratified, or even signed, by the executive.¹⁸² Both practices are consistent with a traditional application of the *Charming Betsy* principle: The court finds a specific obligation---whether emanating from the treaty itself or from customary international law---and then reads domestic statutes consistently with that specific obligation.¹⁸³

¹⁷⁶ See, e.g., *Minister v. Teoh* (1995) 183 A.L.R. 353, 372--73 (Toohey, J., concurring) (citing *Tavita*, in highly controversial decision, for proposition that mere ratification of human rights treaties by executive gives rise to "legitimate expectation" that administrative decisionmakers will exercise statutory discretion in conformity with treaty obligations).

¹⁷⁷ See, e.g., *Thomas v. Baptiste*, [2000] 2 A.C. 1, 9 (P.C. 1998--1999) (appeal taken from Trin. & Tobago) (citing *Tavita* to support notion that national constitution "should . . . be interpreted in accordance with international provisions" of Universal Declaration of Human Rights).

¹⁷⁸ See *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006 (9th Cir. 2005) (citing *Teoh* and *Baker* in considering whether U.S. immigration statute was consistent with customary international law on children's rights).

¹⁷⁹ [cite to statistical survey, figures 2 and 3.

¹⁸⁰ See ICCPR, supra note 11, art. 15(1). The New Zealand Court of Appeal utilized Article 15(1) in interpreting the sentencing provisions of a criminal statute. See *The Queen v. Pora*, [2000] 2 N.Z.L.R. 37, 44--50 (C.A.).

¹⁸¹ See CRC, supra note 10, art. 3(1). Courts have utilized the CRC provision in *Cabrera-Alvarez*, 422 F.3d. at 1010--12; *Baker*, [1999] 2 S.C.R. at 860--62; *Teoh*, 183 A.L.R. at 361--66, and *Tavita*, [1994] 2 N.Z.L.R. at 260--62.

¹⁸² See, e.g., *Cabrera-Alvarez*, 423 F. 3d at 1010 (examining CRC as evidence of customary international law on children's rights).

¹⁸³ See, e.g., Ralph G. Steinhardt, *Recovering the Charming Betsy Principle*, 94 Am. Soc'y Int'l L. Proc. 49, 49 (2000) (describing traditional application of *Charming Betsy* principle).

In other cases, however, courts are utilizing much broader, non-specific treaty provisions---such as the ICCPR's right to freedom from discrimination---as a sort of *bridge* by which much softer forms of international law can be entrenched into domestic legal regimes.¹⁸⁴ In *Hemmes*, for example, the court acknowledged that there was no specific treaty or customary international law obligation to provide adoptees access to information regarding their genetic origins.¹⁸⁵ But scholarly commentary had suggested that adoptees should enjoy such a right, and the court utilized these sources in interpreting the ICCPR's broad nondiscrimination provision---and, through the *Charming Betsy* principle, incorporating this "soft law" into interpretation of the adoption statute itself.¹⁸⁶ Courts have also used treaties as bridges to incorporate soft law norms drawn from Human Rights Committee decisions, reports of United Nations agencies, and non-binding human rights declarations.¹⁸⁷

This use of treaties as bridges to soft law evidences the evolution of a much more monistic conception of the *Charming Betsy* principle. Professor Steinhardt has commented, "Monism, because it recognizes a gradient of norms rather than the pass-fail system of dualism, arguably takes an expansive view of what constitutes relevant international law in the first place."¹⁸⁸ In this view, soft law represents "a rich source of public values in statutory interpretation, because its precepts are formulated slowly, through a process of academic consensus and transnational debate."¹⁹⁰ In the monist view, the *Charming Betsy* principle is a canon of accommodation that emphasizes a values-based interpretation of statutes and "a commitment to plural sources of law."¹⁹¹ By utilizing unincorporated human rights treaties in interpreting domestic statutes, the emerging *Charming Betsy* principle rejects the dualist notion that the only international legal norms that matter are those that have been legislatively adopted by Congress.¹⁹² Instead,

¹⁸⁴ Cf. supra text accompanying notes 115--119 (discussing use of treaties as bridges in gilding the lily context).

¹⁸⁵ *Hemmes v. Young*, [2005] N.Z.L.R. 755, 773 (C.A.); see supra text accompanying note.

¹⁸⁶ *Hemmes*, [2005] N.Z.L.R. at 776.

¹⁸⁷ See, e.g., *Nudd v. The Queen* (2006) 225 A.L.R. 161, 178, 186 (Austl.) (Kirby, J., concurring) (utilizing ICCPR as bridge to incorporate Human Rights Committee comments and foreign case law in case interpreting criminal statute permitting appeal where "miscarriage of justice" occurred at trial); *Canadian Found. for Children v. Canada*, [2004] 1 S.C.R. 76, 101--02 (Can.) (utilizing CRC as bridge to incorporate HRC comments and expert opinion to define language "reasonable under the circumstances" in statute permitting corporal punishment of children).

¹⁸⁸ Steinhardt, *Domestic Statutory Construction*, supra note , at 1128.

¹⁹⁰ *Id.* at 1129 (quoting William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007, 1027 (1989)).

¹⁹¹ *Id.* at 1126.

¹⁹² *Id.* at 1129.

it adopts a more monistic conception, in which emerging norms of international law can be derived from a variety of soft law sources.

C. Entrenching Human Rights Treaties by “Updating” the Common Law

While the rights-conscious *Charming Betsy* principle strives to read domestic statutes consistently with international human rights law, a third technique uses human rights treaties as key sources for developing the normative content of the common law. From a legitimacy standpoint, this is perhaps where judges are on their firmest footing. After all, the incremental development of the common law is the special province of judges, and common law courts in the United States and elsewhere have long drawn on a wide variety of sources in ensuring that the common law remains flexible and relevant to contemporary realities. Thus in most cases, when judges use a human rights treaty as one among many sources to update the common law, the practice will likely be relatively uncontroversial. But some courts are using the common law updating technique much more creatively: They are utilizing human rights treaties to develop alternative common law remedies---that is, to fill perceived gaps in domestic human rights protection, whether those gaps are found in statutory law or even in constitutional protections.

1. The Technique in Practice. --- A fairly straightforward (and largely uncontroversial) example of common law updating is the Australian High Court’s celebrated decision in *Mabo v. Queensland*.¹⁹³ The issue before the court was whether [the iccpr could be used ... indigenous peoples’ native title to land on the Murray Islands had survived the acquisition of sovereignty over the islands by the British Crown. The traditional common law rule, developed during the colonial era by British (and later Australian) courts, clearly denied to indigenous peoples the right to ownership of traditional lands. Courts had drawn the common law rule from the international law principle of *terra nullius*, which permitted colonial nations’ acquisition and exercise of sovereignty over the territory of so-called “backward peoples.”¹⁹⁴ Through domestic application of the *terra nullius* principle, this centuries-old racist stereotype of indigenous peoples had found its way into the common law.¹⁹⁵

In updating Australian common law to reflect contemporary human rights norms respecting the rights of indigenous peoples, the *Mabo* court pointed to the erosion under international law of the *terra nullius* principle itself,¹⁹⁶ noting that if

¹⁹³ (1992) 175 C.L.R. 1 (Austl.).

¹⁹⁴ *Id.* at 32. Rationales behind the *terra nullius* principle included the supposed “civilizing benefits” of imposing Christian and European culture on indigenous peoples, and the notion that European nations had the right to occupy territory in order to bring lands into production that had been left “uncultivated” by indigenous inhabitants. See *id.* at 32--33.

¹⁹⁵ *Id.* at 39--40.

¹⁹⁶ See *id.* at 40--41 (discussing criticism by International Court of Justice).

that principle “no longer commands general support, the doctrines of the common law which depend on [it] can hardly be retained.”¹⁹⁷ It then emphasized the importance of Australia’s recent accession to the Optional Protocol to the ICCPR, which granted Australian citizens the right to bring complaints against the Australian government to the United Nations Human Rights Committee. In the court’s view, despite the fact that the ICCPR itself had not been legislatively incorporated into Australian domestic law, accession to the Optional Protocol “brings to bear on the common law the powerful influence of the Covenant and the international standards it imports.”¹⁹⁸ Thus, while the *Mabo* court was quick to acknowledge limitations on the domestic reach of international law,¹⁹⁹ it asserted that international law had a key role to play in developing domestic legal rules. The court commented, “The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.”²⁰⁰

The Australian High Court’s decision in *Mabo* has proven to be highly influential, both in Australia, and (like *Tavita*) in promoting transnational judicial dialogue on human rights throughout the common law world.²⁰¹ Through such dialogue, foreign courts have adopted and even expanded the *Mabo* approach to updating the common law. For example, while the Australian court in *Mabo* articulated the basic proposition that human rights treaties can serve as legitimate sources in *updating* the common law, the New Zealand Court of Appeal has gone a considerable step further: Relying on the common law updating technique, it has utilized the ICCPR’s privacy provisions to develop common law *alternatives* to statutory protections for breach of privacy.²⁰² Moreover, the New Zealand court interpreted so-called “gaps” in existing legislation as a kind of license for

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 42.

¹⁹⁹ See, e.g., *id.* at 29--30. The Court wrote:

In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. . . . The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed.

Id.

²⁰⁰ *Id.* at 42.

²⁰¹ See, e.g., *Ballina Shire Council v. Ringland* (1994) 32 N.S.W.L.R. 680, 709--10 (N.S.W. C.A.) (Kirby, P., concurring in part and dissenting in part) (relying on *Mabo* as authority for use of ICCPR to develop common law rules); *Mitchell v. Minister of Revenue*, [2001] 1 S.C.R. 911, 927 (Can.); *Chung Ping Kwan v. Lam Island Dev. Co.*, [1997] A.C. 38 (P.C.) (appeal taken from H.K.) (U.K.). Indeed, Justice Kirby of the Australian High Court has called the *Mabo* decision “a crucial legal development in harmony with the essential idea of the Bangalore Principles. Adaptation of the common law . . . , by having regard to principles of international law, is now generally uncontroversial.” Kirby, *Impact on National Constitutions*, *supra* note 18, at 7.

²⁰² *Hosking v. Runting*, [2004] 1 N.Z.L.R. 1, 1 (C.A.).

the court to utilize the ICCPR in updating the common law. In *Hosking v. Runtig*, plaintiffs sought to prevent the defendant from publishing photographs of their children, claiming a tort violation for breach of privacy.²⁰³ Both the ICCPR and the CRC recognize a right to privacy, but these international law protections had not found their way into New Zealand's domestic human rights law. When the New Zealand legislature enacted the Bill of Rights Act, for example, it acknowledged that it was doing so to "affirm" New Zealand's obligations under the ICCPR.²⁰⁴ But it deliberately excluded from the BORA a domestic analogue to the ICCPR's right to privacy.²⁰⁵ Moreover, neither the New Zealand Privacy Act (a comprehensive legislative scheme regulating the collection and disclosure of personal information) nor any other statute recognized a tort for breach of privacy.²⁰⁶

The *Hosking* court refused to treat these omissions as an implicit legislative rejection of a privacy tort,²⁰⁷ instead arguing that they indicated a legislative intent that privacy law "would be left for incremental development."²⁰⁸ Indeed, the court suggested that the statutory gaps in privacy law provided a kind of judicial license to fill those gaps through the development of common law remedies.²⁰⁹ This, the court asserted, "is something the courts are equipped to do. It is the very process of the common law."²¹⁰ Thus in the court's view, the inherent inflexibility of legislative enactments rendered the common law function of judges essential, if New Zealand privacy law was to keep pace with modern developments---and in particular, with New Zealand's commitments under international human rights law.

It is not entirely clear precisely what role international human rights law played in *Hosking*. On the one hand, the court emphasized "the need to develop the common law consistently with international treaties to which New Zealand is a party,"²¹¹ suggesting that the ICCPR and other human rights treaties were entitled to *authoritative legal weight* in developing common law principles. On

²⁰³ Id. at 6--7.

²⁰⁴ BORA, supra note 46, pmb. § (b).

²⁰⁵ See *Hosking*, [2004] 1 N.Z.L.R. at 42--43 (Keith, J., concurring) (explaining legislature's conclusion that "it would be inappropriate to entrench a right that was not by any means fully recognised, which was in the course of development, and whose boundaries would be uncertain and contentious").

²⁰⁶ See id. at 27--30.

²⁰⁷ See id. at 26 ("We do not accept that omission from the Bill of Rights Act can be taken as legislative rejection of privacy as an internationally recognised fundamental value.").

²⁰⁸ Id. at 39 ("It is apparent that such legislative protection as has been provided has been of specific focus and limited. It clearly recognises the privacy value and entitlement to protection. But it cannot be regarded as comprehensive so as to preclude common law remedies.").

²⁰⁹ See id. (citing New Zealand Law Commission in support).

²¹⁰ Id..

²¹¹ Id. at 6 (noting that such an approach is "an international trend").

the other hand, the court stressed the *persuasive* value of such treaties, and rejected a strict dualist approach on this ground. It commented:

The historical approach to the State's international obligations as having no part in the domestic law unless incorporated by statute is now recognised as too rigid. To ignore international obligations would be to exclude a vital source of relevant guidance. It is unreal to draw upon the decisions of courts in other jurisdictions (as we commonly do) yet not draw upon the teachings of international law.²¹²

Accordingly, the court considered the ICCPR and other treaties, along with foreign court decisions, as part of a broader comparative law discussion.²¹³ It concluded that New Zealand common law should recognize a tort for breach of privacy, in part because such a recognition was consistent with New Zealand's international law obligations under the ICCPR and other treaties.²¹⁴

2. Assessment of the Technique: Human Rights Treaties as Gap Fillers--- Analysis of the common law updating technique reveals a judicial reconceptualization of the traditional relationship between human rights treaties and domestic law, and of the common law court's role in mediating that relationship. Judges utilizing the technique tend to view their roles as co-equals with the political branches in developing domestic human rights protections by entrenching international human rights law into the common law. Accompanying this trend is a decided jurisprudential shift away from common law dualism, toward a monistic conception in which human rights treaties can serve as an important influence on the common law, despite the unincorporated status of those treaties in domestic statutory law. Courts defend this shift away from dualism by asserting that human rights treaties are playing a limited role: They are persuasive, not binding, legal authority--and thus no different from foreign judicial decisions, scholarly commentary, or any other source upon which common law courts have traditionally relied. Thus the common law updating technique relies on, and gains much of its normative force from, a certain conflation of human rights treaties with the myriad other sources that might be used in developing the common law.²¹⁵

²¹² Id..

²¹³ See id. at 9--23 (discussing privacy law in United Kingdom, Australia, Canada, and United States); id. at 37--38 (discussing ICCPR and CRC provisions); id. at 58 (Tipping, J., concurring) (discussing privacy provisions of Universal Declaration of Human Rights and European Convention on Human Rights).

²¹⁴ Id. at 38.

²¹⁵ Again, there is the problem of discerning exactly what "work" human rights treaties are really doing in developing the common law. Cf. supra text accompanying notes 131--133 (discussing Professor Young's criticisms of *Roper v. Simmons*, 543 U.S. 551 (2005)). As in the *Charming Betsy* technique, treaties are sometimes utilized as bridges through which "softer"

The common law updating technique can play an especially powerful role in certain common law countries (like Australia) that have neither a constitutional bill of rights nor a foundational human rights statute (like the New Zealand BORA). In such countries, courts can use international human rights law to fill this gap, developing domestic human rights protections by reading the common law consistently with human rights treaties. Moreover, reliance on treaty law transforms the common law into something far more powerful: Interpreted with the help of human rights treaties, a common law rule that was once simply a “guideline of good judicial practice”²¹⁶ can become a rule expressing a fundamental right--one that is backed up by the normative force of the international human rights community itself.²¹⁷

D. Entrenching Human Rights Treaties in a Bill of Rights I: “Contextual” Interpretation

Perhaps the most intriguing interpretive incorporation technique is the use of human rights treaties in a “contextual interpretation” of domestic bills of rights. In contrast to the gilding the lily technique, in contextual interpretation a court’s consideration of international treaty law is tightly interwoven with its analysis of domestic legal sources. Courts do not consider unincorporated human rights treaties to be binding, however; instead, they assert that such sources are useful in elucidating the meaning of domestic provisions. While the ICCPR survey presented here indicates that all of the courts studied have utilized contextual interpretation,²¹⁸ justices on the Canadian Supreme Court are especially strong proponents of the technique.²¹⁹ Since 1984, when the Canadian Charter of Rights and Freedoms entered into effect, the Canadian court has utilized human rights treaties to interpret the Charter in over an estimated 100 cases.²²⁰

1. The Technique in Practice.---Cases utilizing contextual interpretation fall into one of two categories. First, courts use treaties to resolve ambiguities in specific rights provisions (for example, the right to religion or the right to a

international law sources can influence the common law.

²¹⁶ *Antoun v. The Queen* (2006) 224 A.L.R. 5, 6 (Austl.) (Kirby, J., concurring).

²¹⁷ See *id.* (arguing that though “common law principle [prohibiting judicial bias] was already strong,” ratification of ICCPR “reinforced [it] by a rule of international law which expresses the entitlement to an impartial tribunal as a fundamental right of the individual concerned. It is not simply an aspiration or guideline of good judicial practice. It is a basic right.”).

²¹⁸ In total, 14% of the opinions in the survey utilize the contextual constitutional interpretation technique. [cite to survey, figure 2].

²¹⁹ See LeBel & Chao, *supra* note, at 35--63.

²²⁰ See *id.* at 45.

speedy trial).²²¹ Second, courts use treaties to discern the scope of certain *limitations provisions* in a domestic bill of rights.²²²

An intriguing example of contextual interpretation to resolve ambiguities in rights provisions is Justice Bastarache's opinion in *The Queen v. Advance Cutting & Coring Ltd.*,²²³ in which he utilized the ICCPR to resolve an ambiguity in the Canadian Charter of Rights and Freedoms' provision protecting freedom of association. Under a Quebec law regulating the construction industry, workers were required to register with a labor union prior to seeking employment.²²⁴ The defendant corporation was found guilty of employing workers who had not registered with a union.²²⁵ In its defense, the corporation argued that the workers' statutory obligation to join a union infringed their "right not to associate."²²⁶ The Canadian Charter, however, is ambiguous on this point: It guarantees the "freedom of association" as a "fundamental freedom," but it is silent on the question whether the freedom of association encompasses a *negative right not to associate*, as the defendant argued.²²⁷

In his opinion, Justice Bastarache utilized contextual interpretation in asserting that the ambiguous Charter provision should be read to encompass a negative right not to associate.²²⁸ He turned to international human rights law as support for this expansive reading. The problem, however, was that the major human rights instruments suffered from their own ambiguity where the existence of a negative right not to associate was concerned. Neither the ICCPR nor any

²²¹ See, e.g., *The Queen v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, 232--33 (Can.) (discussing ICCPR and Universal Declaration of Human Rights); *The Queen v. Taito*, [2005] N.Z.L.R. 815, 830 (C.A.) (referring to interpretation of ICCPR to justify applying BORA provision conferring "right to be tried without undue delay" extended to appeals); *Mendelsohn v. Attorney Gen.*, [2000] N.Z.L.R. 268, 273 (C.A.) (referring to ICCPR to justify conclusion that BORA's right to freedom of religion did not impose on government positive duty to protect or promote religion).

²²² See, e.g., *Sauvé v. Canada*, [2002] 3 S.C.R. 519, 589--94 (Can.) (Gonthier, J., dissenting) (citing treaties to support conclusion that disenfranchisement of prisoners is consistent with Charter's "reasonableness" limitation); *The Queen v. Sharpe*, [2001] 1 R.C.S. 45, 138--42 (Can.) (L'Heureux-Dube, J., concurring) (citing treaties to support conclusion that restrictions on child pornography fell within Charter's "reasonableness" limitation).

²²³ [2001] 3 S.C.R. at 226--60 (Bastarache, J., dissenting).

²²⁴ *Id.* at 272--73 (LeBel, J., plurality opinion).

²²⁵ *Id.* at 279.

²²⁶ See *id.* at 272--74.

²²⁷ See Canadian Charter, *supra* note 114, ch. 11, § 2(d) ("Everyone has the following fundamental freedoms: . . . (d) freedom of association.").

²²⁸ Justice Bastarache and the plurality agreed that a right not to associate was included in the Charter. They disagreed on the scope of that right. Compare *Advance Cutting*, [2001] 3 S.C.R. at 211--12 (LeBel, J., plurality opinion) ("The acknowledgment of a negative right not to associate would not justify a finding of an infringement of the guarantee whenever a form of compelled association arise."), with *id.* at 266--68 (Bastarache, J., dissenting) ("[T]he interpretation of ideological conformity must be broader and take place in context.").

other human rights treaty specifically recognizes such a right; indeed, the wording of the ICCPR's "freedom of association" provision seems to support only a positive right to associate.²²⁹

Undeterred, Justice Bastarache employed a creative reading of international human rights law based on analysis of those sources that *did* support his view. First, he argued that in this particular case, a contextual interpretation of the freedom of association should include consideration of "fundamental values that must be protected in the workplace, includ[ing] the freedom of . . . mobility, liberty, . . . and the right to work."²³⁰ By thus characterizing the issue more broadly, he also broadened the scope of relevant sources to encompass treaty provisions guaranteeing the right to work and the right to choose one's employment.²³¹ Relying on these treaty provisions, he argued that recognizing a negative right not to associate would render the Charter provision consistent with international human rights law.²³²

Second, Justice Bastarache pointed to soft law sources---in particular, to the nonbinding Universal Declaration of Human Rights (UDHR)²³³ provision that "[n]o one may be compelled to belong to an association."²³⁴ His reliance on the UDHR's "right not to associate" provision is striking, given the subsequent history of that provision. The drafters of the ICCPR and other major human rights instruments adopted, and thus gave legal effect to, many of the UDHR's provisions. But they declined to adopt the right not to associate.²³⁵ Justice Bastarache, however, was undeterred by this history: He simply asserted that "the specificity of the international covenants did not replace the broad principles enunciated in the Universal Declaration."²³⁶ Indeed, he argued that the ICCPR's

²²⁹ See ICCPR, *supra* note 11, art. 22, §1 ("Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.").

²³⁰ *Advanced Cutting*, [2001] 3 S.C.R. at 231 (Bastarache, J., dissenting).

²³¹ *Id.* at 248 ("The State Parties . . . recognize . . . the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts" (quoting International Covenant on Economic, Social, and Cultural Rights (ICESCR), art. 6, § 1, Dec. 16, 1966, S. Exec. Doc. D. 95-2 (1978), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) (emphasis omitted))).

²³² *Id.*

²³³ Universal Declaration of Human Rights, G.A. Res. 217(III)A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

²³⁴ *Advance Cutting*, [2001] 3 S.C.R. at 232, 235 (asserting that art. 20 of the UDHR recognized "the bilateral nature of the associational right" (quoting *Lavigne v. Ont. Pub. Serv. Employees Union*, [1991] 2 S.C.R. 211, 319 (Can.) (LaForest, J.))). He also cited a "right not to associate" provision in the African Charter on Human and Peoples' Rights, see *id.* at 233, and found support in the ICESCR's provisions protecting trade unions. See *id.* at 234 ("[T]he continuing importance of the negative right is seen in art. 8(1)(a) of the ICESCR, wherein the joining of a union is referred to as the 'right' of the worker to join a union of his or her 'choice'.").

²³⁵ See *id.* at 234--36 (acknowledging history of UDHR provision).

²³⁶ *Id.* at 234.

freedom of association provisions are merely intended to “clarify” the UDHR’s positive right to associate, “but do not minimize the [UDHR’s] negative right.”²³⁷

A more common type of contextual interpretation is the use of human rights treaties to interpret limitations provisions in domestic bills of rights. In Canada, for example, Section 1 of the Canadian Charter guarantees all of the rights set out in the Charter, “subject . . . to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”²³⁸ Similarly, Section 7 guarantees “everyone . . . the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”²³⁹ The Canadian Supreme Court frequently utilizes the ICCPR and other treaties to interpret the “reasonableness” and “fundamental justice” limitations.²⁴⁰ In determining the scope of a limitation in any given case, the court employs a “balancing approach” in which it weighs the right at stake against the government’s objectives in infringing on that right. International human rights law is used to tip the balance in favor of a rights conscious interpretation of the limitations provision.

An example of this contextual balancing approach is *Suresh v. Canada*,²⁴¹ in which the Canadian Supreme Court utilized the ICCPR and other human rights treaties in interpreting the “fundamental justice” limitation in Section 7 of the Canadian Charter. Suresh was a Sri Lankan refugee accused of providing support to the Tamil Tigers, an alleged terrorist organization.²⁴² The Canadian Minister of Citizenship and Immigration ordered his deportation, and he appealed, arguing that he would face a substantial risk of torture if deported to Sri Lanka.²⁴³ He asserted that his deportation would thus violate Section 7 of the Charter, as it deprived him of his right to security and was not in accord with the principles of “fundamental justice.”²⁴⁴

The court began its analysis by emphasizing the importance of judicial deference to the political branches in decisions involving terrorism and national security.²⁴⁵ On the other hand, the court asserted, “[t]he principles of fundamental

²³⁷ Id.

²³⁸ Canadian Charter, supra note 114, § 1.

²³⁹ Id. § 7.

²⁴⁰ See, e.g., supra notes 222-- (citing select cases).

²⁴¹ [2002] 1 S.C.R. 3, 31 (Can.) (“The approach is essentially one of balancing.”).

²⁴² Id. at 14--15.

²⁴³ Id. at 16--17.

²⁴⁴ Id. at 17.

²⁴⁵ Id. at 23--29 (finding that Parliament intended to grant substantial discretion to Minister of Citizenship and Immigration in deportation determinations, and concluding that deportation order should be upheld unless it is “patently unreasonable”). The court noted that where national security was concerned, “the cost of failure can be high,” and noted that this underlined “the need for the judicial arm of government to respect the decisions of ministers of the

justice . . . ‘do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system.’”²⁴⁶ Thus in analyzing “fundamental justice” under the Charter, the correct approach was a contextual one which balanced Canada’s legitimate interest in combating terrorism with Suresh’s interest in not being deported to torture. The court further noted, “[i]t is inherent in the . . . balancing process that the outcome may well vary from case to case depending on the mix of contextual factors put into the balance.”²⁴⁷

In *Suresh*, a major contextual factor that the court put into the balance was international human rights law prohibiting torture.²⁴⁸ The court cited provisions prohibiting the practice in the ICCPR and the Convention Against Torture. Moreover, it noted that the Human Rights Committee has interpreted the ICCPR provision to encompass a prohibition on deportation to torture.²⁴⁹ As for the traditional dualist view that these unincorporated treaties were inapplicable on the domestic plane, the court acknowledged these limitations; but it asserted that unincorporated treaties still have a legitimate role to play in informing domestic law:²⁵⁰

International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. However, in seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada's international obligations *qua*

Crown.” *Id.* at 25 (emphasis omitted). In addition to the executive’s expertise in this area, judicial deference was due because

such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.

Id. at 26 (quoting *Sec. of State for Home Dep’t v. Rehman*, [2001] UKHL 47, ¶ 62, [2001] 3 W.L.R. 877, 897 (H.L.) (Hoffman, L.)).

²⁴⁶ *Id.* at 31; see also *id.* at 29 (“[T]he courts have an important role to play in ensuring that the Minister has considered the relevant factors and complied with the requirements of the Act and the Constitution.” (citation omitted)).

²⁴⁷ *Id.* at 31 (quoting *United States v. Burnes*, [2001] 1 S.C.R. 283, 323 (Can.)).

²⁴⁸ See *id.* (“The inquiry into the principles of fundamental justice is informed not only by Canadian experience and jurisprudence, but also by international law, including *jus cogens*.”); *id.* at 37--38 (“[T]he principles of fundamental justice expressed in . . . the *Charter* . . . cannot be considered in isolation from the international norms which they reflect.”).

²⁴⁹ See also *id.* at 41.

²⁵⁰ Indeed, the court had an expansive view of which international law sources were relevant in Charter interpretation. See *id.* at 31 (holding that, in fundamental justice inquiry, court should “take[] into account Canada's international obligations and values as expressed in ‘[t]he various sources of international human rights law--declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, [and] customary norms’” (quoting *Burnes*, [2001] 1 S.C.R. at 330)).

obligations; rather, our concern is with the principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself.²⁵¹

Despite the court's protestations to the contrary, however, human rights treaties appeared to be playing a more important role than as mere "evidence" of the principles of fundamental justice. Indeed, Canadian domestic law also strongly condemned torture---thus rendering the evidentiary, or persuasive, value of international law redundant, at best.²⁵² Instead, the court inserted international human rights law into the mix of "contextual factors" used to balance individual against governmental interests: By so doing, it was able to use the very strong condemnation of torture found in international human rights instruments to "tip the balance" in the fundamental justice inquiry in favor of the individual interest.²⁵³ The court concluded, "[B]oth domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests."²⁵⁴ Thus, the court concluded, "barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice. . . . [Canada] must find some other way of ensuring national security."²⁵⁵

3. Assessing the Technique: Human Rights Treaties as Interlocutors--

Courts utilizing the contextual interpretation technique view international human rights treaties not as binding sources of law, but as useful sources in a broader comparative law discussion. Indeed, contextual interpretation might be viewed as an example of Professor Vicki Jackson's "engagement model," in which courts view domestic constitutions as "site[s] of engagement with the transnational, informed but not controlled by consideration of other nations' legal norms."²⁵⁶ In the engagement model,

[T]he constitution's interpreters do not treat foreign or international material as binding, or as presumptively to be followed. But neither do they put on blinders that exclude foreign legal sources and experience. Transnational sources are seen as interlocutors,

²⁵¹ Id. at 38.

²⁵² The court discussed at length Canadian law and practice prohibiting torture. See id. at 32--37.

²⁵³ See, e.g., id. at 45 ("The rejection of state action leading to torture generally, and deportation to torture specifically, is virtually categoric.").

²⁵⁴ Id.

²⁵⁵ Id.

²⁵⁶ Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 Harv. L. Rev. 109, 112 (2005) [hereinafter Jackson, *Constitutional Comparisons*].

offering a way of testing understanding of one's own traditions and possibilities by examining them in the reflection of others'.²⁵⁷

Because they view human rights treaties as interlocutors between the national and the transnational, courts utilizing the contextual interpretation technique do not tend to distinguish between treaties as evidence of customary international law, on the one hand, and as evidence of “international opinion,” on the other. Indeed, judicial opinions utilizing the ICCPR show little interest in determining whether an international norm has achieved customary international law status.²⁵⁸ From the perspective of the engagement model, this lack of interest is understandable: The courts’ concern is with treaty law as evidence of the international community’s normative commitments, not with their own country’s “international obligations *qua* obligations.”²⁵⁹

E. Entrenching Human Rights Treaties in a Bill of Rights II: The Constitutional Charming Betsy Canon

For some courts, there is a fine line between a *voluntary* domestic engagement with international law, and an *obligatory* convergence with that law. In contrast to the engagement model, in the convergence model international human rights law becomes an authoritative---even binding---source for constitutional interpretation. Professor Jackson explains convergence as an alternative model that “sees national constitutions as sites for implementation of international law.”²⁶⁰ A powerful example of the convergence model is the interpretive incorporation technique known as the “constitutional *Charming Betsy*” canon, which construes domestic constitutional provisions in conformity

²⁵⁷ Id. at 114.

²⁵⁸ Typical is *United States v. Burns & Rafay*, [2001] 1 S.C.R. 283 (Can.), in which the Canadian Supreme Court discussed international law and foreign practice on the death penalty, and concluded:

This evidence does not establish an international law norm against the death penalty . . . It does show, however, significant movement towards acceptance internationally of a principle of fundamental justice that Canada has already adopted internally, namely the abolition of capital punishment. . . . The existence of an international trend against the death penalty is useful in testing our values against those of comparable jurisdictions.

Id. at 334--35; see also *Suresh*, [2002] 1 S.C.R. at 5 (considering international law in addressing issue whether torture prohibition had achieved *jus cogens* status, but concluding that it need not resolve issue, as available evidence suggested that torture norm had reached such status that it “could not be easily derogated from”).

²⁵⁹ *Suresh*, [2002] 1 S.C.R. at 38.

²⁶⁰ Jackson, *Constitutional Comparisons*, *supra* note 256, at 112. As examples, she cites the South African Constitution and other “post-World War II constitutions that explicitly incorporate international law as a controlling legal norm.” Id. at 112--13. Jackson identifies another type of “convergence” as “a decentralized process of norm development by national judges leading to common methods of reasoning and similar results.” Id. I adopt her term “convergence” here only in the sense of “implementation.”

with international human rights law.²⁶¹ In essence, advocates of the canon urge the application of the Bangalore Principles to constitutional interpretation, asserting that “[w]here the [c]onstitution is ambiguous, [a court] should adopt that meaning which conforms to the principles of universal and fundamental rights rather than an interpretation that would involve a departure from such rights.”²⁶²

1. The Technique in Practice.---In most common law countries, the constitutional *Charming Betsy* canon remains the object of human rights amicus briefs, scholarly articles, and (in Australia) the occasional dissenting opinion urging adoption of the technique.²⁶³ But as the ICCPR study presented in Part II.F indicates, in the Commonwealth Caribbean a powerful constitutional *Charming Betsy* canon has entered the mainstream of judicial practice. It has done so courtesy of the British Privy Council, which currently serves as the final court of appeal for several countries in the region.²⁶⁴ On several occasions, the Privy Council has utilized human rights treaties not merely as persuasive evidence of the international community’s normative commitments, but as binding obligations on courts to interpret “ambiguous” constitutional provisions

²⁶¹ See generally Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy*, 67 *Ohio St. L.J.* (forthcoming 2006) (on file with the *Columbia Law Review*) [hereinafter Alford, *Foreign Relations*] (discussing constitutional *Charming Betsy*).

²⁶² *Kartinyeri v. Commonwealth* (1998) 152 A.L.R. 540, 598 (Austl.) (Kirby, J., concurring). Justice Harry Blackmun also urged such an approach, commenting, “it . . . is appropriate to remind ourselves that the United States is part of the global community . . . and that courts should construe our statutes, our treaties, and our Constitution, where possible, consistently with the customs and usages of civilized nations.” Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 *Yale L.J.* 39, 48 (1994).

²⁶³ See, e.g., Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 *Loy. L.A. L. Rev.* 271, 335 (2003); Ann I. Park, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 *UCLA L. Rev.* 1195, 1243--49 (1987); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 *Hastings L.J.* 805, 824--41 (1990); see also Bradley, *Breard*, *supra* note 45, at 546--48 (criticizing the trend).

Justice Michael Kirby of the Australian High Court is perhaps the most vocal judicial proponent of the constitutional *Charming Betsy* canon. See, e.g., *Al-Kateb v. Godwin* (2004) 208 A.L.R. 124, 163--68 (Kirby, J., dissenting) (discussing international standards regarding government’s power to indefinitely detain stateless persons); *Kartinyeri v. Commonwealth* (1998) 152 A.L.R. 540, 598 (applying canon to constitutional provisions regarding aboriginal peoples); *Newcrest Mining v. Commonwealth* (1997) 147 A.L.R. 42, 147--50 (applying Australian Constitution’s version of takings clause); see also *Austin v. Commonwealth* (2003) 195 A.L.R. 321, 390--92 (Kirby, J., dissenting).

²⁶⁴ As I discuss *infra* text accompanying notes 317--319, the Privy Council has lost this status, in part as a result of Caribbean nations’ rejection of the Council’s robust anti-death penalty jurisprudence. See also Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 *Colum. L. Rev.* 1832 *passim* (2002).

consistently with international law.²⁶⁵ Moreover, the case law reveals a decided *creeping monist* trend from an engagement to a convergence model, as the Privy Council moves from a contextual interpretation of domestic constitutional texts to a decidedly more monistic *Charming Betsy* approach.

Two cases from the Privy Council's extensive death penalty jurisprudence provide examples of the trend.²⁶⁶ First, in *Reyes v. The Queen*,²⁶⁷ the Privy Council utilized the ICCPR's prohibition on inhuman punishment to interpret Belize's similar constitutional prohibition, and then applied that prohibition in striking down a Belizean statute that imposed a mandatory death sentence for murder.²⁶⁸ At issue in *Reyes* was whether imposition of the mandatory death penalty infringed the Belize Constitution's right to protection from inhuman or degrading treatment or punishment.²⁶⁹ The court began its analysis of international law by describing its interpretive approach---one that initially suggested the limited use of treaties in contextual interpretation (an approach similar to that adopted by the Canadian Supreme Court, discussed above).²⁷⁰ It declared, "A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court . . . is required to . . . ensure contemporary protection of [those] right[s] in the light of evolving standards of decency that mark the progress of a maturing society."²⁷¹ It explained that human rights treaties to which Belize was a party provided evidence of "norms [that] have been accepted by Belize as consistent with the fundamental standards of humanity."²⁷² Moreover, the *Reyes* court gave a nod to traditional common law dualism, noting that with respect to treaties that had not been incorporated into domestic law, "[i]t is open to the people of any country to lay down the rules by

²⁶⁵ See, e.g., *Matthew v. Trinidad & Tobago*, [2004] UKPC 33, [2005] 1 A.C. 433, 440 (P.C. 2004) (appeal taken from Trin. & Tobago) (U.K.); *Watson v. The Queen*, [2004] UKPC 34, [2005] 1 A.C. 472 (P.C. 2004) (appeal taken from Jam.) (U.K.); *Lewis v. Attorney Gen. of Jam.*, [2001] 2 A.C. 50, 51 (P.C. 2000) (appeal taken from Jam.) (U.K.).

²⁶⁶ See *Boyce v. The Queen*, [2004] UKPC 32, [2005] 1 A.C. 400 (P.C. 2004) (appeal taken from Barb.); *Reyes v. The Queen*, [2002] UKPC 11, [2002] 2 A.C. 235 (P.C.) (appeal taken from Belize).

²⁶⁷ *Reyes*, [2002] UKPC 12, [2002] 2 A.C. 235.

²⁶⁸ Chapter 101 of the Criminal Code of Belize provides, "Every person who commits murder shall suffer death." *Crim. Code of Belize*, ch. 101, ¶ 106 (2000); see also *Reyes*, [2002] UKPC ¶ 4, [2002] 2 A.C. at 238.

²⁶⁹ *Reyes* also asserted a violation of the right to life, but the court did not reach that issue. See *Reyes*, [2002] UKPC ¶¶ 1, 48, [2002] 2 A.C. at 237, 258.

²⁷⁰ Cf. Part II.D (discussing contextual interpretation). In addition to international law, the court discussed the evolution of the British common law rule mandating the death penalty for murder, as well as similar developments in other countries. *Reyes*, [2002] UKPC ¶¶ 10--16, [2002] 2 A.C. at 241--43.

²⁷¹ See *Reyes*, [2002] UKPC ¶ 25, [2002] A.C. at 246 (citing *Trop v. Dulles*, 356 U.S. 86 (1958)).

²⁷² *Id.* ¶ 27, [2002] 2 A.C. at 247.

which they wish their state to be governed and they are not bound to give effect in their Constitution to norms and standards accepted elsewhere.”²⁷³

The Privy Council concluded its description of the proper interpretive approach, however, with a turn toward a more monistic conception that, at a minimum, hinted at acceptance of the constitutional *Charming Betsy* principle. It declared, “the courts will not be astute to find that a Constitution fails to conform with international standards of humanity and individual right, unless it is clear, on a proper interpretation of the Constitution, that it does.”²⁷⁴ Accordingly, the court relied heavily on the ICCPR and other treaties prohibiting inhuman punishment to interpret Belize’s similar constitutional provision.²⁷⁵ But because these treaties do not explicitly prohibit the mandatory death penalty, the court followed the practice of numerous other common law courts.²⁷⁶ It used those treaties as *bridges* to incorporate “soft law” sources---for example, decisions from various human rights tribunals declaring the mandatory death penalty to be inhuman punishment.²⁷⁷ Relying on these sources, the court concluded that the statute authorizing the mandatory death penalty violated Belize’s constitutional prohibition on inhuman punishment.²⁷⁸

If *Reyes* merely hinted at acceptance of the constitutional *Charming Betsy* principle, in subsequent cases the Privy Council has wholeheartedly endorsed the technique. In *Boyce v. The Queen*,²⁷⁹ for example, the court explicitly utilized the constitutional *Charming Betsy* technique to incorporate the ICCPR and other international human rights obligations into domestic constitutional law.²⁸⁰ *Boyce* involved a constitutional challenge to a Barbadian statute requiring a mandatory death sentence for murder. The court determined that the statute violated the Barbadian constitution’s prohibition on inhuman punishment,²⁸¹ but this time it explicitly applied the constitutional *Charming Betsy* principle. It commented:

²⁷³ Id. ¶ 28, [2002] 2 A.C. at 247.

²⁷⁴ Id.

²⁷⁵ See id. ¶¶ 21,41, [2002] 2 A.C. at 245, 255. The court also relied on treaty provisions guaranteeing the right to life and the right to a fair trial. Id. ¶ 22, [2002] 2 A.C. at 255.

²⁷⁶ See supra text accompanying notes 115--119, 160--170 (discussing treaties as bridges in gilding the lily and common law updating).

²⁷⁷ See id. ¶¶ 26--42, [2002] 2 A.C. at 246--56 (discussing decisions of Inter-American Commission, European Court of Human Rights, and courts in United Kingdom, United States, South Africa, India, and Canada).

²⁷⁸ See id. ¶ 43, [2002] 2 A.C. at 256--57.

²⁷⁹ [2004] UKPC 32, [2005] 1 A.C. 400 (P.C. 2004) (appeal taken from Barb.) (U.K.).

²⁸⁰ See, e.g., *Matthew v. Trinidad & Tobago*, [2004] UKPC 33, [2005] 1 A.C. 433, 440 (P.C. 2004) (appeal taken from Trin. & Tobago) (U.K.); *Watson v. The Queen*, [2004] UKPC 34, [2005] 1 A.C. 472 (P.C. 2004) (appeal taken from Jam.) (U.K.); *Lewis v. Attorney Gen. of Jam.*, [2001] 2 A.C. 50, 51 (P.C. 2000) (appeal taken from Jam.) (U.K.).

²⁸¹ See *Boyce*, [2005] UKPC ¶ 27, [2005] 1 A.C. at 416.

[I]nternational law can have a significant influence upon the interpretation of the Constitution because of the well established principle that the courts will so far as possible construe domestic law so as to avoid creating a breach of the State's international obligations. . . . [I]f the legislation is ambiguous (in the sense that it is capable of a meaning which either conforms to or conflicts with the treaty) the court will, other things being equal, choose the meaning which accords with the obligations imposed by the treaty.²⁸²

Indeed, the court declared that the constitutional *Charming Betsy* canon was so well established as to be “trite constitutional doctrine.”²⁸³ The Human Rights Committee and other tribunals had declared the mandatory death penalty to be violations of the ICCPR and other treaties to which Barbados was a party.²⁸⁴ Thus, because the constitution’s inhuman punishment provision was “ambiguous” within the meaning of the constitutional *Charming Betsy* canon, the court concluded that it should be read in conformity with these international decisions.²⁸⁵

Ambiguity in constitutional provisions, however, is sometimes in the eye of the beholder. While all of the judges agreed that the *Charming Betsy* principle applied to the Barbadian Constitution’s inhuman punishment provision, the Barbadian constitution threw in a new wrinkle (not present in *Reyes*) that forced the judges to part company on the application of the principle to another key constitutional provision. The Barbadian constitution contained a savings clause, providing that no existing law “shall be held to be inconsistent with or in contravention of” the rights provisions in the Constitution.²⁸⁶ The mandatory death penalty statute was in existence at the time the constitution came into force.²⁸⁷ Thus the majority, applying a literal interpretation of the savings clause, declared that it was unambiguous in its terms and “saved” the mandatory death penalty statute from unconstitutionality.²⁸⁸

²⁸² Id. ¶ 25, [2005] 1 A.C. at 415--26 (citation and internal quotation marks omitted).

²⁸³ Id. ¶ 29, [2005] 1 A.C. at 417.

²⁸⁴ See id. ¶ 22, [2005] 1 A.C. at 414--15.

²⁸⁵ See id. ¶ 25, [2005] 1 A.C. at 415--16. The court did, however, acknowledge traditional dualist limitations, observing, “This does not of course have any direct effect upon the domestic law of Barbados. The rights of the people of Barbados in domestic law derive solely from the Constitution.” Id. ¶ 25, [2005] A.C. at 415; see also id. ¶ 29, [2005] 1 A.C. at 417 (“The Constitution does not confer upon the judges a vague and general power to modernise it.”).

²⁸⁶ See Barbados Independence Order 1966 [Constitution] ch. III, § 26(1).

²⁸⁷ See *Boyce*, [2005] UKPC ¶ 1, [2005] 1 A.C. at 410--11.

²⁸⁸ See id. ¶ 3, [2005] 1 A.C. at 410--11 (explaining that savings clause “stands there protecting the validity of existing laws until such time as Parliament decides to change them”); id. ¶ 6, [2005] 1 A.C. at 411 (“[T]he mandatory death penalty . . . is prevented by section 26 from being unconstitutional.”).

The dissent, however, urged an alternative rights conscious reading:²⁸⁹ The clause preserved “existing laws,” it argued, but it was silent on the issue of *modifications* to those laws.²⁹⁰ Having thus found a creative ambiguity in the savings clause, the dissent would cure the conflict between Barbados’s international obligations and its domestic law by modifying the language of the mandatory death penalty statute itself: Under the dissent’s approach, the modified statute would permit, but not require, application of the death penalty, thus rendering it consistent with international human rights law.²⁹¹ And because it was a “modified” statute not existing at the time the Constitution came into force, it was not protected by the savings clause.²⁹²

For the majority in *Boyce*, this creative interpretation of the constitutional *Charming Betsy* principle was simply too much of a stretch. It viewed the two constitutional provisions at issue very differently.²⁹³ “Inhuman punishment” and similar rights provisions make up part of the Constitution as “living instrument,” and thus “invite and require periodic re-examination of [their] application to contemporary life.”²⁹⁴ But, argued the majority, “concrete and specific” provisions like Barbados’s savings clause do not “allow themselves to be judicially adapted to changes in attitudes and society in the same way.”²⁹⁵ To the dissent’s complaint that its “over-literal” application of the *Charming Betsy* principle was inconsistent with the living instrument approach to constitutional interpretation, the majority retorted:

The “living instrument” principle has its reasons, its logic and its limitations. It is not a magic ingredient which can be stirred into a jurisprudential pot together with “international obligations,” “generous construction” and other such phrases, sprinkled with a cherished aphorism or two and brewed up into a potion which will make the Constitution mean something which it obviously does not. If that provokes accusations of literalism, originalism and similar heresies, their Lordships must bear them as best they can.²⁹⁶

²⁸⁹ It complained that the majority’s reading of the savings clause “puts a narrow and over-literal construction on the words used, . . . and puts Barbados in flagrant breach of its international obligations.” *Id.* ¶ 78, [2005] 1 A.C. at 429 (dissenting).

²⁹⁰ See *id.* ¶ 79, [2005] 1 A.C. at 429--30.

²⁹¹ See *id.* (urging modification of section 2 of Offences Against the Person Act 1994 to read, “Any person convicted of murder may [rather than “shall”] be sentenced to, and suffer, death”).

²⁹² See *id.*

²⁹³ See *id.* ¶¶ 28--29, [2005] 1 A.C. at 416--17.

²⁹⁴ *Id.* ¶ 28, [2005] 1 A.C. at 416--417.

²⁹⁵ *Id.* ¶ 29, [2005] 1 A.C. at 417. The court noted, “It follows that the decision as to whether to abolish the mandatory death penalty must be, as the Constitution intended it to be, a matter for the Parliament of Barbados.” *Id.* ¶ 6, [2005] 1 A.C. at 411.

²⁹⁶ *Id.* at ¶ 59, [2005] 1 A.C. at 424.

3. Assessment of the Constitutional *Charming Betsy* Technique: The Final Triumph of Creeping Monism?--- Of all the interpretive incorporation techniques catalogued in this Article, the constitutional *Charming Betsy* canon is by far the most monistic in character.²⁹⁷ Its monism is rooted in a judicial conception of the domestic constitution not as a unique foundational text, but as a special kind of “statute” or “basic law”.²⁹⁸ In this regard, Justice Kirby (one of the strongest proponents of the canon) argues:

[E]very other statute of this land is read, in the case of ambiguity, to avoid so far as possible [conflicts with international law]. . . . Likewise, *the Australian Constitution, which is a special statute*, does not operate in a vacuum. It speaks to the people of Australia. But it also speaks to the international community as the basic law of the Australian nation which is a member of that community.²⁹⁹

Thus, for judges adopting the constitutional *Charming Betsy* canon, a constitution no longer speaks only to the national community that gave it birth; it now speaks to the broader international community of which the national community is merely a part.³⁰⁰ More importantly, the constitution is not only *informed* by the normative commitments of the international community (as is true for courts engaging in contextual interpretation): It is now bound to incorporate those commitments, so far as possible.

The constitutional *Charming Betsy* canon demonstrates the dramatic potential of a monistic approach to treaty incorporation. If advocates of the canon

²⁹⁷ Judges employing the technique sometimes give a nod to dualism and its limitations on unincorporated treaties. For example, Justice Michael Kirby concedes that a court should not “adopt an interpretive principle as a means of introducing, by the backdoor, provisions of international treaties or other international law concerning fundamental rights not yet incorporated into . . . domestic law.” *Newcrest Mining Ltd. v. Commonwealth* (1997) 147 A.L.R. 42, 147 (Austl.); see also *supra* note 273 (describing Privy Council’s discussion of dualism in *Boyce v. The Queen*). Nevertheless, he and other judges utilizing the technique flatly state that “[t]o the full extent that its text permits, [a domestic] [c]onstitution, as the fundamental law of government in [a] country, accommodates itself to international law.” *Newcrest Mining*, 147 A.L.R. at 148.

²⁹⁸ See, e.g., *Boyce*, [2004] UKPC ¶ 25, [2005] 1 A.C. at 415--16 (citing “well established principle that the courts will so far as possible construe domestic [constitutional] law so far as to avoid creating a breach of the State’s international obligations”).

²⁹⁹ *Kartinyeri v. Commonwealth* (1998) 152 A.L.R. 540, 599 (Austl.) (Kirby, J., concurring).

³⁰⁰ See *Newcrest Mining*, 147 A.L.R. at 148 (Kirby, J., concurring) (“[T]he Constitution not only speaks to the people of Australia who made it and accept it for their governance. It also speaks to the international community as the basic law of the Australian nation which is a member of that community.”). Justice Kirby’s approach echoes the Australian High Court’s approach in *Teoh*, asserting that the act of treaty ratification was a “positive statement” to both the international and national communities. See *Minister for Immigration & Ethnic Affairs v. Teoh* (1995) 128 A.L.R. 353, 365 (Austl.); see also *supra* text accompanying note 84.

are serious in their contention that courts should interpret all ambiguities in domestic constitutional provisions “in conformity with” international law, the canon has the potential to work a fundamental reordering in the traditional common law conception of the relationship between domestic and international law. But it is a reordering that is both practically and normatively problematic.³⁰¹ First, “ambiguities,” broadly defined, are legion in the constitutions of all common law countries. As foundational texts, constitutions tend to set out basic rights and values with little specific guidance as to the drafters’ intent with respect to their application. Simply put, constitutions are *not* legislation: They are, in a sense, inherently ambiguous.

Second, the constitutional *Charming Betsy* canon may be problematic as a structural matter. Justice McHugh of the Australian High Court (one of Justice Kirby’s sharpest critics) argues:

The rationale for the [traditional] rule [that ordinary statutes should be construed to conform with the rules of international law] . . . is inapplicable to a Constitution---which is a source of, not an exercise of, legislative power. The rule, where applicable, operates as a statutory implication. But the legislature is not bound by the implication. It may legislate in disregard of it. If the rule were applicable to a Constitution, it would operate as a restraint on the grants of power conferred. The Parliament would not be able to legislate in disregard of the implication.³⁰²

³⁰¹ Justice Kirby’s advocacy of a constitutional *Charming Betsy* canon has sparked tremendous debate within Australia. Justice McHugh’s criticisms in *Al-Kateb* have been particularly incisive. *Al-Kateb v. Commonwealth* (2004) 208 A.L.R. 124, 140--45 (Austl.) (McHugh, J., concurring) (“The claim that the Constitution should be read consistently with the rules of international law has been decisively rejected by members of this court on several occasions. As a matter of constitutional doctrine, it must be regarded as heretical.”). Justice Kirby has responded to his critics both in his judicial opinions and in numerous speeches. See, e.g., *Newcrest Mining*, 147 A.L.R. at 148 (Kirby, J., concurring) (“The use of international law [to influence legal development and constitutional interpretation] has been specifically sanctioned by the Privy Council when giving meaning to express constitutional provisions relating to ‘fundamental rights and freedoms.’” (quoting *Minister of Home Affairs v. Fisher*, [1980] A.C. 319, 328--29 (P.C.) (U.K.) (Wilberforce, J.))); Kirby, *Impact on National Constitutions*, supra note 18, at 20 (“The diversity of humanity . . . demands utilization of established national courts in spreading, where appropriate, any emerging consensus of humanity, that international law expresses.”). The constitutional *Charming Betsy* canon has also been criticized by certain U.S. scholars. See, e.g., Alford, *Foreign Relations*, supra note 261 (arguing that there is little support for taking foreign relations into account in interpreting content of individual liberties); Bradley, *Breard*, supra note 45, at 531 (arguing that conception of law presuming that international law must be incorporated into domestic law is inconsistent with pervasive and longstanding principles of U.S. jurisprudence).

³⁰² *Al-Kateb*, 208 A.L.R. at 141--42 (McHugh, J., concurring) (emphasis omitted).

The constitutional *Charming Betsy* canon, thus broadly defined and strictly applied, could effectively result in the subordination of all domestic law to international human rights law. While the other interpretive incorporation techniques identified in this Article depart from traditional common law dualism to varying degrees, the adoption of a broad constitutional *Charming Betsy* canon would result in the triumph of monism, and the defeat of traditional dualism, in the common law legal tradition.

The typology catalogued above demonstrates judicial development of a diverse set of interpretive incorporation techniques for utilizing human rights treaties in interpreting domestic law. My objectives in creating the typology have been twofold: First, it will assist courts in identifying and assessing specific available techniques, and in developing sound jurisprudential approaches to the use of international legal sources in interpreting domestic law. Second, the creation of such a typology is a critical first step in analyzing the normative issues raised by the interpretive incorporation trend among common law courts -- issues that I consider in Part III of this Article.

F. Assessing the Interpretive Incorporation Trend: Statistical Evidence

While a detailed typology of available techniques will prove useful standing alone, both courts and scholars also need statistical information – for example, information regarding the rates at which different national courts are utilizing the various interpretive incorporation techniques, as well as their tendencies to favor one technique over another. The statistical evidence presented here draws on a sample of ninety-two judicial opinions from the high courts of Australia, Canada, New Zealand, and the United States, as well as the British Privy Council’s Commonwealth Caribbean jurisprudence. The study encompasses all opinions from 2000 to the present in which the court in question cited the ICCPR in interpreting a domestic legal provision.

One of the important insights of the ICCPR study is that the five interpretive incorporation techniques catalogued are diverse not only in their application to various kinds of texts (common law, statutory, or constitutional law), but also in the extent to which they represent departures from the common law’s historical strict dualist approach. As a normative matter, this diversity in departures from dualism is important in assessing the legitimacy of the various techniques: As I discuss in Part III, some techniques may prove to be well within the ambit of the common law judge’s role, while the aggressively monistic approaches of other techniques may call into question their legitimacy.

As Figure 1 shows, broadly speaking, the five techniques might be viewed as tending to fall roughly along a spectrum, from mild to much more radical

departures from historical dualism.³⁰³ At one end of the extreme, the gilding the lily technique (taken at face value) restricts human rights treaties to a kind of “value added” in analyzing domestic legal sources.³⁰⁴ Slightly farther along the spectrum are the common law updating and statutory *Charming Betsy* techniques. Both have their roots in well-established judicial techniques that enjoy strong historical pedigrees: Common law courts have historically drawn on a wide variety of sources in ensuring the flexibility of the common law, just as they have interpreted statutes, where possible, to avoid conflicts with international law.³⁰⁶ Thus the “rights conscious” approaches to statutory and common law, while they certainly take the traditional techniques in a more monistic direction, might be viewed as enjoying a certain dualist legitimacy based on historical pedigree.

Further still on the spectrum are the interpretive incorporation techniques addressing constitutional interpretation. In the contextual approach, courts view unincorporated treaties as useful in elucidating the meaning of domestic provisions; unlike the gilding the lily technique, however, consideration of unincorporated treaties is integral to the court’s constitutional analysis---thus representing a more aggressive departure from traditional dualism.³⁰⁷ Finally, at the end of the dualism-monism spectrum is the constitutional *Charming Betsy* canon: As I have noted previously, by requiring that constitutional provisions be interpreted “in conformity” with international human rights law (whether or not that law is domestically incorporated), the constitutional *Charming Betsy* canon represents a radical departure from historical common law dualism.³⁰⁸

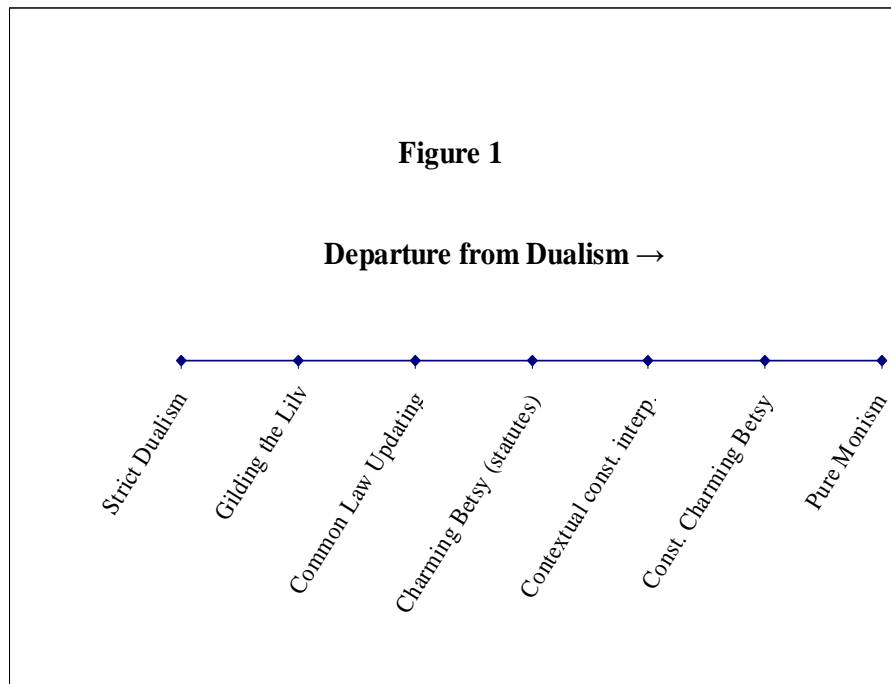
³⁰³ Figure 1 charts the monistic or dualistic character of the various techniques loosely and in the broadest of terms. Of course, as my discussion of the ICCPR case law demonstrates, see supra Part II, a court’s use of a particular technique in a specific case might be more or less monistic in approach than Figure 1 would otherwise indicate.

³⁰⁴ See supra Part II.A.

³⁰⁶ See supra text accompanying notes --173, 193--214 (discussing, respectively, historical pedigrees of *Charming Betsy* and common law updating approaches).

³⁰⁷ See supra Part II.D.

³⁰⁸ See supra Part II.E.



If, as I have argued, the interpretive incorporation techniques are evidence of a creeping monist trend in the jurisprudence of the world’s common law courts, just how far has the creep toward pure monism advanced? Statistical evidence drawn from the ICCPR case study suggests that, with the exception of one outlier court, the advance of creeping monism has been fairly limited to date. Figure 2 shows a breakdown of the total usage, by all national courts studied here, of the various interpretive incorporation techniques. It indicates that of the ninety-two judicial opinions analyzed,³⁰⁹ thirty-one percent utilized the gilding the lily technique. Another forty-three percent were updating the common law or utilizing the *Charming Betsy* canon for statutory interpretation. Only twelve percent of the opinions utilized the most radical technique: the constitutional *Charming Betsy* technique.³¹⁰

³⁰⁹ I analyzed a total of eighty-seven cases. In five of those cases, two judicial opinions utilized an interpretive incorporation technique. See, e.g., *Watson v. The Queen*, [2004] UKPC 34, PIN, [2005] 1 A.C. 472, PIN (P.C.) (appeal taken from Jam.) (U.K.) (utilizing contextual approach); *id.* at PIN, [2005] 1 A.C. at PIN (dissenting opinion) (utilizing constitutional *Charming Betsy*).

³¹⁰ See Figure 2.

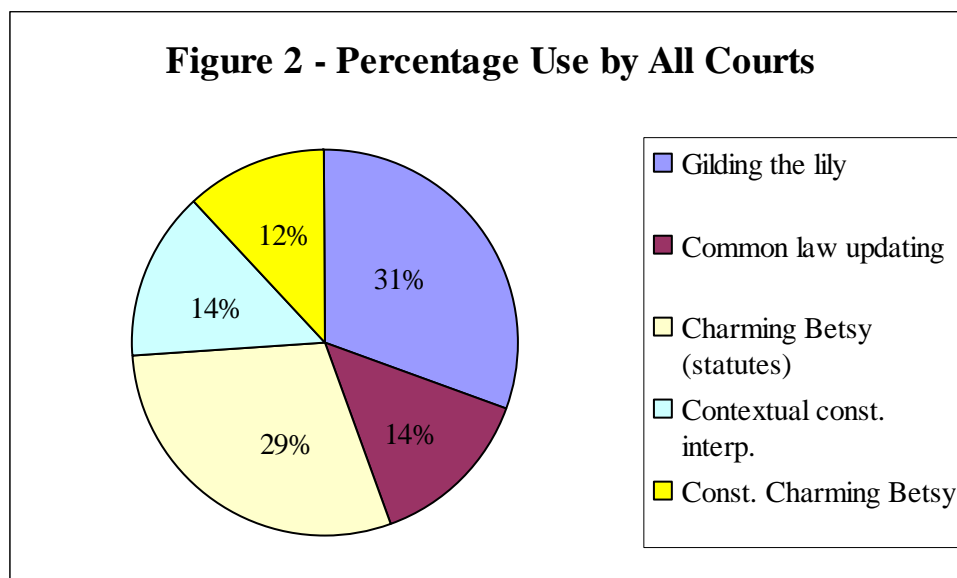
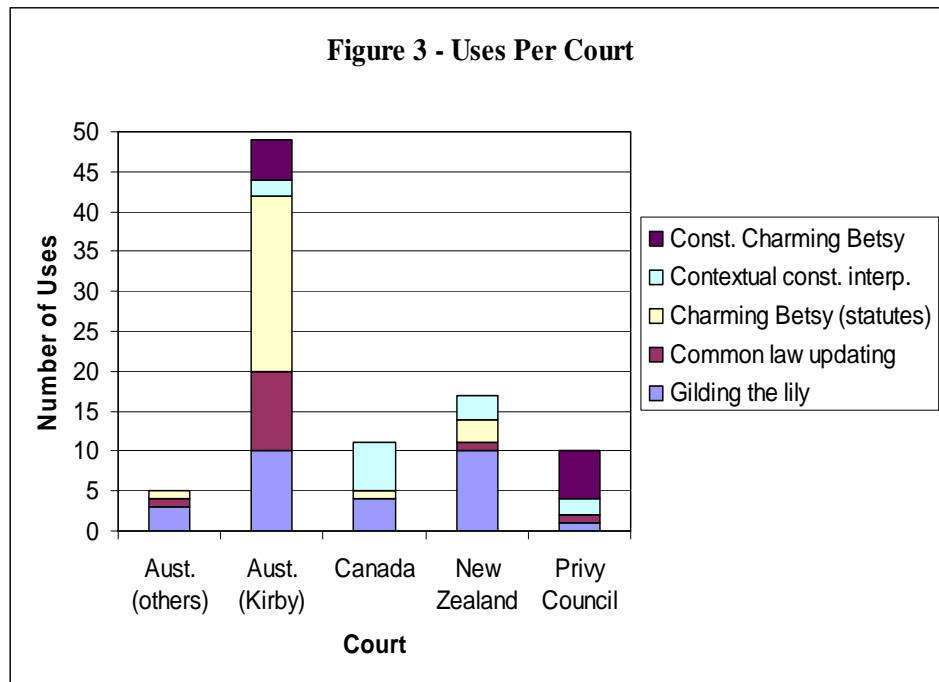


Figure 3, below, provides further evidence of the fairly slow advance of creeping monism in most of the courts studied. It shows the rates at which different national courts have utilized the ICCPR in interpreting domestic law, as well as their tendencies to favor one interpretive incorporation technique over another. Particularly noteworthy is the influence of Justice Michael Kirby on the Australian data: Of the fifty-four Australian opinions citing the ICCPR, forty-nine are Kirby opinions.³¹¹ Interestingly, as Figure 3 shows, even Justice Kirby (one of the strongest proponents of the constitutional *Charming Betsy* technique) utilized it in only four percent of his opinions. The Canadian, New Zealand, and U.S. courts have not utilized the technique at all.

³¹¹ In order to prevent skewing of the data, Figure 3 includes two sets of data for the Australian High Court--one for Justice Kirby and the other for the other justices on the court.



The outlier court is the British Privy Council, which over the past decade has charted an aggressively monistic path toward judicial incorporation of human rights treaty law into the constitutions of the Commonwealth Caribbean.³¹² In the ten Privy Council opinions citing the ICCPR since 2000, members of the court utilized the constitutional *Charming Betsy* technique a total of six times, and the contextual interpretation approach twice.³¹³ The Privy Council has routinely held that domestic constitutional provisions must be interpreted in conformity with the Caribbean nations’ international human rights treaty obligations.³¹⁴ It has done so despite the vociferous complaints of prosecutors and government officials that such an approach is inconsistent with a traditional dualistic approach to treaty incorporation.³¹⁵ In particular, in its controversial death penalty jurisprudence,

³¹² Of course, members of the Privy Council themselves have characterized the court’s approach somewhat differently. See *Matthew v. Trinidad & Tobago*, [2004] UKPC 33, pin, [2005] 1 A.C. 433, 453 (P.C.) (appeal taken from Trin. & Tobago) (U.K.) (Bingham, L., dissenting) (stating that Privy Council has “brought to its task of constitutional adjudication a broader vision, recognising that a legalistic and over-literal approach to interpretation may be quite inappropriate when seeking to give effect to the rights, values and standards expressed in a constitution as these evolve over time”).

³¹³ See Figure 3.

³¹⁴ See, e.g., *Matthew*, [2004] UKPC 33, pin, [2005] 1 A.C. 433, 440; *Watson*, [2004] UKPC 34, [2005] 1 A.C. 472; *Lewis v. Attorney Gen. of Jam.*, [2001] 2 A.C. 50, 51 (P.C. 2000) (appeal taken from Jam.) (U.K.).

³¹⁵ See, e.g., *Boyce v. The Queen*, [2004] UKPC 32, pin, [2005] 1 A.C. 400, 407--10 (P.C. 2004) (appeal taken from Barb.) (U.K.) (summarizing argument of prosecutors, who claimed that “[t]he Constitution is the supreme law of Barbados . . . [under which] existing laws shall not be held to be inconsistent with fundamental rights and freedoms guaranteed in . . . the

the Privy Council has seemed to view its role primarily as an internalizer of international norms against the death penalty into Caribbean society.³¹⁶

The Privy Council's experience in the Commonwealth Caribbean may provide a cautionary tale regarding the risks for common law courts who depart too dramatically from a dualistic conception of the relationship between domestic and international law. The Privy Council's death penalty jurisprudence resulted in a severe political backlash, with several Caribbean nations withdrawing from certain international human rights treaties altogether.³¹⁷ Moreover, eleven Caribbean nations have agreed to sever ties with the Privy Council and to create a new Caribbean Court of Justice to serve as the region's final court of appeal.³¹⁸ I do not attempt to draw a specific causal connection between this backlash and the court's use of monistic interpretive incorporation techniques in its death penalty jurisprudence. There is no question, however, that in striking down Caribbean death penalty laws, the Privy Council's tendency to focus primarily on human rights treaties and on the views of international jurists certainly contributed to its downfall.³¹⁹ The statistical evidence drawn from the ICCPR study supports two broad conclusions with respect to the creeping monism phenomenon: First, most common law courts have been slow to abandon historical dualism in treaty incorporation, instead adopting incremental approaches that gradually erode dualism in favor of a diverse array of interpretive incorporation techniques. Second, in adopting such techniques to incorporate international human rights obligations into domestic law, common law courts who abandon the strictures of common law dualism too quickly, or too aggressively, do so at their peril.

G. The Impact of Transnational Judicial Dialogue on Interpretive Incorporation: Borrowing, Conflation, and Creeping Monism

A final important insight revealed by the ICCPR case study is the extraordinarily powerful role that transnational judicial dialogue has played in the

Constitution"); see also Waters, *supra* note 1, at 563 n.342 (discussing criticisms by government officials of Privy Council decisions rooted in international law).

³¹⁶ Waters, *supra* note 1, at 563.

³¹⁷ For example, Jamaica withdrew from the First Optional Protocol to the ICCPR. Trinidad & Tobago denounced both the Optional Protocol and the American Convention on Human Rights, effectively eliminating death row inmates' rights to petition international or regional human rights tribunals. See Helfer, *supra* note 264, at 1881.

³¹⁸ See Helfer, *supra* note 264, at 1884 & nn.225--227 (discussing decision to sever ties). At the time of this writing, the Caribbean Court of Justice remains in the planning stages, and the Privy Council remains the final court of appeal for the Commonwealth Caribbean nations.

³¹⁹ As Larry Helfer has commented, "[O]nce the court began to articulate norms in conflict with local values, the court came to be perceived as engaging in a form of 'judicial imperialism' by 'super-impos[ing] . . . Eurocentric notions and values on the region.'" *Id.* at 1888 (quoting Rose-Marie B. Antoine, *Opting Out from the Optional Protocol--Is This Inhumane?*, 3 *Caribbean L. Bull.* 28, 37 (1998)).

development of the interpretive incorporation techniques catalogued in this Article – and thus in the growth of creeping monism. Indeed, in the vast majority of judicial opinions utilizing one of the techniques, analysis of human rights treaties is inextricably linked to a comparative law discussion of foreign judicial decisions. Common law courts cite and discuss foreign case law for at least two purposes. First, foreign case law puts flesh onto otherwise bare treaty provisions (like the ICCPR’s prohibition on inhuman punishment) by providing evidence of “international opinion” on the proper interpretation of these provisions.³²⁰ Second, courts rely on foreign case law as support for their own decisions to utilize human rights treaties in interpreting domestic law.³²¹ For example, the New Zealand court in *Tavita* first articulated a rights conscious *Charming Betsy* principle and applied it to the Minister of Immigration’s acts under New Zealand’s immigration statute.³²² Subsequent decisions in Canada, Australia, and the United States relied on---and even expanded---the rights conscious approach of *Tavita* in developing similar rights conscious approaches to their own immigration statutes.³²³

Thus in transnational judicial dialogue, the relationship between treaties and foreign judicial decisions is a symbiotic one. Human rights treaties serve as common foundational texts around which courts can construct a transnational dialogue. At the same time, courts rely on foreign case law to support their own decisions to erode traditional dualist doctrines by utilizing unincorporated human rights treaties in their work. The symbiotic relationship between foreign and international sources of law is thus an essential ingredient in the emergence of a robust transnational judicial dialogue on human rights issues.

In this emerging human rights dialogue, it is also clear that what the U.S. Supreme Court does still matters to foreign courts. Foreign courts routinely rely on U.S. case law in discerning the content of international treaty provisions,

³²⁰ See, e.g., *R. v. Sharpe*, [2001] 1 S.C.R. 45, 140--43 (Can.) (discussing foreign case law alongside international prohibitions on child pornography); *Mendelssohn v. Attorney-Gen.*, [2000] 2 N.Z.L.R. 268, 275 (C.A.) (discussing foreign case law alongside treaty provisions on religion).

³²¹ See, e.g., *Baker v. The Queen* (2004) 210 A.L.R. 1, 36--38 (Austl.) (Kirby, J., dissenting) (“Unless incorporated by domestic law, such international norms do not, as such, bind Australian courts. Nevertheless, they are part of the contemporary context in which they Constitution, as a living body of law, falls to be construed by this court.”); *Kartinyeri v. Commonwealth* (1998) 152 A.L.R. 540, 598--600 (Austl.) (Kirby, J., concurring) (“Where the Constitution is ambiguous, this court should adopt that meaning which conforms to the principles of universal and fundamental rights rather than an interpretation which would involve a departure from such rights.”).

³²² See *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257, 266 (C.A. 1993) (describing negative consequences that might result if statute were interpreted to allow executive to ignore human rights norms or obligations); supra Part II.B.1.

³²³ See supra text accompanying notes -- (discussing Australian, Canadian, U.S., and other foreign decisions relying on *Tavita*).

discussing at length Supreme Court decisions as evidence of international opinion on a given issue.³²⁴ They also rely on Supreme Court decisions (for example, *Trop v. Dulles*'s "evolving standards of decency"³²⁵) as support for adoption of their own "rights conscious," "contextual," or "purposive" approaches to treaties in constitutional interpretation.³²⁶ Indeed, since *Roper v. Simmons* was decided two years ago, common law courts in other countries have cited the decision at least ten times:³²⁷ They frequently comment that *Roper* demonstrates the U.S. Supreme Court's commitment to developing U.S. constitutional law in light of international human rights law, and they rely on the decision as support for using human rights treaties in interpreting their own domestic law.³²⁸

At the same time, the case law reveals significant conflation of the various interpretive incorporation techniques, and transnational judicial dialogue seems to play a role in exacerbating the problem. The opinions of Justice Kirby of the Australian High Court are a case in point: In advocating a constitutional *Charming Betsy* principle, he relies for support on other common law courts' uses of much less radically monistic interpretive incorporation techniques. For example, he relies for support on the *Roper* Court's relatively brief discussion of foreign and international law to gild the domestic lily. Indeed, he makes the astonishing claim that *Atkins v. Virginia* (in which the Supreme Court briefly mentioned international law in a footnote) and *Lawrence v. Texas* (in which the Court discussed foreign case law but did not discuss treaty law) also provide

³²⁴ See, e.g., *Boyce v. The Queen*, [2004] UKPC 32, PIN, [2005] 1 A.C. 400, 414 (P.C.) (appeal taken from Barb.) (U.K.) (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 431 U.S. 633 (1977), in striking down mandatory death penalty).

³²⁵ 356 U.S. 86, 102--03 (1958); see, e.g., *Koroitamana v. Commonwealth* (2006) HCA 28, ¶ 66 (June 14, 2006) (Austl.) (Kirby, J., concurring), available at http://www.austlii.edu.au/au/cases/cth/high_ct/2006/28.html (on file with the *Columbia Law Review*) (relying on *Trop* to justify turning to international principles of law to interpret Australian Constitution); *Reyes v. The Queen*, [2002] UKPC 11, ¶ 26, [2002] 2 A.C. 235, 246 (P.C.) (appeal taken from Belize) (U.K.) (citing *Trop* for proposition that court must consider fundamental rights in constitution "in the light of evolving standards of decency and mark the progress of a maturing society").

³²⁶ See, e.g., *Austin v. Commonwealth* (2003) 195 A.L.R. 321, 392 (opinion of Kirby, J.) (drawing support for constitutional interpretation by referencing fact that Justice Stevens "called in aid opinions concerning the requirements of international human rights law," in *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002)).

³²⁷ See, e.g., *APLA Ltd. v. Legal Servs. Comm'n* (2005) 219 A.L.R. 403, 491 (Austl.) (Kirby, J., dissenting) (citing *Roper* as comparable support for argument that unrestricted communication in advertising is central to Constitution from "the central place that freedom of expression holds in the international law of human rights and fundamental freedoms"); *R v. Sec'y of State for the Home Dep't ex rel. Smith*, [2005] UKHL 51, ¶¶ 21--27, [2006] 1 A.C. 159, PIN (U.K. 2005) (appeal taken from Q.B.) (U.K.) (Hale, J., concurring) (citing *Roper* as support for "why it is right to treat juvenile murderers differently from adults").

³²⁸ See, e.g., *In re Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 218 A.L.R. 483, 517 & n.128, 519 & n.137 (Kirby, J., concurring) (relying on *Roper* to support proposition that it is "useful and proper to check conclusions affecting constitutional interpretation by reference to any relevant international law").

evidence that “the majority view in the United States now appears to favour the [constitutional *Charming Betsy*] interpretive principle.”³²⁹ As evidence of what he suggests is worldwide judicial support for that principle, Justice Kirby has also cited the Canadian Supreme Court’s contextual approach to constitutional interpretation,³³⁰ and the Australian High Court’s use of human rights treaties to update the common law.³³¹

As the empirical study presented here has demonstrated, however, the various interpretive incorporation techniques are not interchangeable. All of the techniques reflect a strong judicial commitment to ensuring that domestic law develops in a manner that takes international human rights norms into account. But that is where the similarities end. Taken at face value, for example, *Roper* restricted the use of international law to a “confirmatory” role in constitutional interpretation; at most, the Court used international law to shore up a weak argument based on domestic sources alone.³³² *Roper* certainly did not examine the Eighth Amendment’s Cruel and Unusual Punishment Clause for “conformity” with international law, as the constitutional *Charming Betsy* principle requires.

These are not simply semantic distinctions: They go to the heart of the democratic legitimacy of the interpretive incorporation trend. As I discussed in Part II.F, in terms of their departure from traditional common law dualism, the techniques that I have identified fall on a spectrum. The gilding the lily technique may represent a minor departure from strict common law dualism, but it is worlds away from the deeply monistic constitutional *Charming Betsy* canon. Similarly, while the Canadian Supreme Court’s contextual approach to constitutional interpretation encourages a *voluntary engagement* with human rights treaty law, it does not require---or support---*obligatory convergence* with that law, as the constitutional *Charming Betsy* canon seems to do.

³²⁹ *Al-Kateb v. Goodwin* (2004) 208 A.L.R. 124, 172 (Austl.) (Kirby, J., dissenting) (“When such a court, in a legal culture traditionally less open to outside legal ideas than ours has been, accepts the relevance for its reasoning of the jurisprudence emerging from a ‘wider civilisation’, it is time for this Court to do likewise.”). Justice Kirby would no doubt have relied instead on the U.S. Supreme Court’s much more extensive use of international law in *Roper v. Simmons*, if that ruling had been available at the time of the *Al-Kateb* decision.

³³⁰ See *Kartinyeri v. Commonwealth* (1998) 152 A.L.R. 540, 598 (Austl.) (Kirby?) (“[I]n interpreting the Canadian Charter of Rights and Freedoms, that country’s Supreme Court has frequently had regard to international instruments.”).

³³¹ See *Newcrest Mining Ltd. v. Commonwealth* (1997) 147 A.L.R. 42, 148 (Austl.) (citing *Mabo v. Queensland* (1992) 175 C.L.R. 1 (Austl.)), and commenting that while neither common nor constitutional law “necessarily conform with international law[,] . . . international law is a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental rights”).

³³² See supra Part II.A.2 (discussing *Roper*).

The problem thus highlights the importance for U.S. courts, and their foreign counterparts, of drawing careful distinctions among diverse interpretive incorporation techniques. The interpretive incorporation trend will likely grow along with domestic courts' engagement in transnational judicial dialogue on human rights, but so too will concerns about the legitimacy of the trend. Domestic audiences' willingness to accept---or even embrace---courts' emerging roles as transnational actors will depend in large part on the courts themselves, and on their abilities to draw careful, sensible distinctions among the various interpretive techniques and to evaluate each one on its own terms. The goal of the typology and statistical evidence presented here, along with the normative framework offered in the final Part of this Article, is to assist courts in legitimating their emerging transnational role by developing sound jurisprudential approaches to the interpretive incorporation trend.

III. TOWARD A PRINCIPLED NORMATIVE FRAMEWORK FOR EVALUATING INTERPRETIVE INCORPORATION TECHNIQUES

Thus far, this Article has posited that a narrow lens approach is useful in discerning key trends in transnational judicial dialogue (here, the advent of creeping monism),³³³ and in developing detailed typologies of exactly how courts are utilizing a specific foreign or international source.³³⁴ A narrow lens approach is also essential in conducting a normative assessment of these trends. In the context of international treaties, for example, there is no question that the trend toward interpretive incorporation has the potential to transform the world's common law courts into increasingly powerful mediators between the domestic and international legal regimes. But the phenomenon also raises questions regarding the democratic legitimacy of this transformation in the judicial role. While an exhaustive treatment of these issues is beyond the scope of this Article, in this Part I sketch out a preliminary normative assessment and an agenda for further research.³³⁵ First, I argue that at least some erosion of strict common law

³³³ See supra Part I.

³³⁴ See supra Part II.

³³⁵ Jeremy Waldron has sketched out the enormous task that awaits scholars in articulating a complete theory for U.S. courts' citation to foreign law:

[The theory] has to be complicated enough to answer a host of questions . . . about the authority accorded foreign law (persuasive versus conclusive), about the areas in which foreign law should and should not be cited . . . , and about which foreign legal systems should be cited (only democracies, for example, or tyrannies as well). The theory has to be broad enough to explain the use of foreign law in all appropriate cases: Too many scholars call for a theory that will explain the citation of foreign law only in constitutional cases. The theory has to be persuasive enough to dispel the serious misgivings that many Americans have about this practice It must explain why American courts are legally permitted (or obliged) to cite to non-American sources and how that practice connects with the status of courts as legal institutions.

Waldron, supra note 124, at 129--30 (footnote omitted).

dualism in treaty incorporation is a legitimate judicial response to the era of human rights internationalism. Second, I map out a possible normative framework for evaluating courts' use of human rights treaties in interpreting domestic law. I argue that in choosing among available interpretive incorporation techniques, courts should adopt a stance that is fundamentally *dualist in orientation, but monist in technique*: In short, courts should adopt a technique-specific evaluative approach in which they assess the legitimacy or appropriateness of a given interpretive technique on a case by case basis – taking into account a variety of factors that are unique to their own nations' experience with the treaty in question. By applying a case-by-case approach, courts will develop jurisprudential approaches to interpretive incorporation that are uniquely appropriate to their own domestic contexts. In the United States, moreover, the framework offered here will help courts to steer a path around the “Crossfire”-style debates that have thus far plagued American discourse on this issue.

A. Can Common Law Courts Abandon Dualism?

In developing a principled jurisprudential framework regarding the use of unincorporated human rights treaties, courts must first address two fundamental questions: Can common law courts legitimately abandon their historical dualist orientation, and is this transformation in their roles a salutary one? My answer to both questions is a *qualified* “yes”. The historical and philosophical underpinnings of common law dualism have eroded, and an increasingly globalized legal regime supports a judicial shift away from a strict dualist approach to international law.

Throughout the common law world, the historical justifications for dualism have eroded over the last several decades. In the British Commonwealth the traditional dualist approach to unincorporated treaties was based largely on separation of powers concerns: Historically, the executive branch had the sole power to ratify treaties. By requiring implementing legislation for a treaty to take domestic effect, dualism provided an important legislative check on the executive's power.³³⁷ But in many countries from the British Commonwealth tradition, structural changes have rendered this separation of powers concern much less problematic. Australia and New Zealand, for example, have introduced reforms to give their parliaments greater participation in the treaty-making process; Canada is considering similar reforms.³³⁸ In countries that have adopted such

³³⁷ See *supra* text accompanying notes --.

³³⁸ See Charlesworth et al., *supra* note, at 439; Mark W. Gobbi, *Enhancing Public Participation in the Treaty-Making Process: An Assessment of New Zealand's Constitutional Response*, 6 *Tul. J. Int'l & Comp. L.* 57, 85 (1998) (discussing New Zealand tradition of executive securing enactment of implementing legislation before ratifying a treaty); Joanna Harrington, *Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making*, 55 *Int'l & Comp. L.Q.* 121, 131--41 (2006) (detailing Australian reforms, and current Canadian debates over reform).

structural changes, implementing legislation plays a much less significant role as a check on executive power.

In the United States, historical justifications for common law dualism have even less force. First, in sharp contrast to the British Commonwealth tradition, the U.S. Constitution mandates that the Senate be heavily involved in the treaty ratification process.³³⁹ Moreover, while there is considerable debate surrounding the intent of the Founders with respect to treaty incorporation, the text of the U.S. Constitution is arguably monistic in construction.³⁴⁰ While both courts and policymakers beginning in the twentieth century have adopted a non-self-executing approach to unincorporated human rights treaties, a more monistic approach can be reconciled with the constitutional text.³⁴¹

The last several decades have also witnessed the erosion of many of the philosophical underpinnings of common law dualism. The dualist tradition emphasizes the sovereignty of nations as an important basis for the distinction between domestic and international law.³⁴² In an increasingly globalized legal world, however, traditional notions of sovereignty are under attack from many quarters. In particular, challenges come from the rise of international judicial institutions, to which the United States and most countries from the British Commonwealth have ceded significant amounts of authority over internal affairs.³⁴³ In such cases, jurisdictional lines between “national” and “international” become blurred.³⁴⁴ So, too, do “jurisdictional” lines between

³³⁹ As a result, the separation of powers concerns behind the traditional dualist approach to unincorporated treaties carry less weight in the U.S. system. Still problematic, however, is the absence of the House of Representatives from the treaty-making process. See Yoo, *supra* note 24, at 1961 (observing that non-self-executing requirement for treaties plays important role in protecting legislative prerogatives of House).

³⁴⁰ See *supra* Part I.A. Article VI, clause 2 provides: “This Constitution, . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2. A plain reading of this text suggests that treaties become domestic law once “made”---i.e., immediately upon coming into force. See Vázquez, Laughing, *supra* note, at 2169--70. The text thus supports the monist position that no implementing legislation is required to give domestic legal effect to treaties. But see Yoo, *supra* note 24, at 1962--67 (arguing that constitutional text can be read to establish that treaties do not “take effect as internal U.S. law” until implemented by federal statute).

³⁴¹ The same holds true in countries that are part of the British Commonwealth. The dualist approach to treaties appears to be a matter of long-standing historical practice, rather than a constitutional requirement.

³⁴² See *supra* Part I.A.

³⁴³ See generally Anne-Marie Slaughter, *A New World Order* (2005) (discussing these transformations and their impact on courts).

³⁴⁴ See Ian Brownlie, *Principles of Public International Law* 584 (5th ed. 1998) (suggesting that domestic courts are increasingly exercising a type of “international jurisdiction” that blurs line between national and international).

courts and policymakers.³⁴⁵ In a world which has thus witnessed serious challenges to traditional notions of sovereignty and jurisdiction, one must at least question the continuing validity of strict dualist doctrines premised on those concepts.

On the other hand, a judicial shift toward monism raises legitimacy concerns that must be taken into account. First, while traditional notions of sovereignty and jurisdiction may be under attack, it does not follow that the philosophical moorings of traditional common law dualism have eroded completely. Indeed, in some respects distinctions between the “national” and the “international” become even more important in a world in which jurisdictional boundaries are increasingly unclear. In this regard, Roger Alford has pointed to the dangers of an “international countermajoritarian difficulty”³⁴⁶ when domestic courts rely on international human rights treaties in reviewing domestic legislative or executive acts. Moreover, the symbiotic relationship between treaties and foreign judicial decisions identified in this Article may exacerbate the problem. When courts rely on a global *judicial* consensus as evidence of international law--with treaties acting primarily as bridges for the construction of that judicial consensus---their decisions may be criticized as doubly countermajoritarian.³⁴⁷ Hence the rise, not only in the United States but throughout the common law world, of complaints from policymakers (and jurisprudentially conservative judges): They view interpretive incorporation as an improper attempt to bring in through the “judicial back door” international human rights norms that could not have been brought in through the legislative front door.³⁴⁸

Moreover, context plays a key role here. Dialogue among the world’s common law courts can be invaluable in helping to shape sound jurisprudential approaches to treaty incorporation. But given their deeply dualist roots, the use of monistic approaches by common law courts is inherently suspect. As Laurence Helfer has pointed out, the extent to which domestic courts can serve as “domestic ‘transmission belts’” for international norms will vary from jurisdiction to

³⁴⁵ A case in point is the controversy over consular notification currently raging in the United States: a tangled web of jurisdictional battles among the International Court of Justice, the U.S. Supreme Court, various state courts, and the Bush Administration. See Vicki C. Jackson, World Habeas Corpus, 91 Cornell L. Rev. 303, 347--64 (2006) (describing how courts have been asked to choose between opinion of President and International Court of Justice).

³⁴⁶ See Roger P. Alford, Misusing International Source to Interpret the Constitution, 98 Am. J. Int’l L. 57, 58--62 (2004).

³⁴⁷ See Waters, *supra* note 1, at 561--62 (discussing double countermajoritarian problem).

³⁴⁸ *Al-Kateb v. Godwin* (2004) 208 A.L.R. 124, 134--35 (Austl.) (McHugh, J., concurring); see also *Baker v. Canada*, [1999] 2 S.C.R. 817, 865--66 (Can.) (Iacobucci, J., concurring) (arguing that result of court’s rights conscious approach to statutory *Charming Betsy* canon would be that litigants are “able to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament”).

jurisdiction, and the risks for courts are much higher “in dualist jurisdictions that strictly separate national and international law or limit the role of courts in enforcing international commitments.”³⁴⁹ Moreover, the risks will vary from one common law country to another. Thus courts in each country should take care to develop approaches that accommodate significant differences in history, sources of authority, and contemporary domestic realities. The jurisprudential approaches deemed appropriate in New Zealand or Canada may be infeasible---or inadvisable---for U.S. or Australian courts.

The challenge for the world’s common law courts, then, is to develop a jurisprudential approach that balances these competing concerns. In my view, a dualist-oriented common law court can legitimately utilize an unincorporated treaty as a source of authority in interpreting domestic law, in some (but certainly not all) circumstances. After all, unincorporated treaties are not irrelevant within the domestic legal system: In the United States, for example, unincorporated treaties may not grant individuals judicially enforceable rights, but they do have the force of domestic law as “the supreme Law of the land.”³⁵⁰

Moreover, in the era of human rights internationalism, the act of legislative implementation of a treaty arguably holds less significance than it once did.³⁵¹ It serves, of course, as ironclad proof that the legislature intends a particular treaty to have domestic legal effect---and thus to be an authoritative source of law for the courts. But there are alternative means by which the political branches can indicate such intent. For example, in utilizing the ICCPR in interpreting domestic statutes, the New Zealand and Australian courts have relied heavily on those countries’ accession to the Optional Protocol to the ICCPR, which permits individuals to bring complaints against their governments for domestic human rights violations. The courts have suggested that their countries’ accession to the Optional Protocol provides a kind of alternative proof of legislative intent to give the treaty domestic legal effect.³⁵²

³⁴⁹ Helfer, *supra* note 264, at 1891. By contrast, Helfer points out, “where judicial consultation of foreign and international legal sources is a constitutional mandate (as in South Africa), [domestic] resistance to a judgment that relies on those sources is likely to be weak.” *Id.* (footnote omitted).

³⁵⁰ See Vázquez, Laughing, *supra* note, at 2170. But see Yoo, *supra* note 24 (arguing that statutes do not have force of domestic law under Supremacy Clause).

³⁵¹ See *supra* text accompanying notes 337--338 (discussing reforms in treaty ratification process in Australia, New Zealand, and Canada). To the extent that these reforms give parliaments a greater role in the treaty-making process, they lessen the importance of implementing legislation as a check on executive power.

³⁵² Indeed, the New Zealand court in *Tavita* made the bold assertion that “[s]ince New Zealand’s accession to the Optional Protocol, the United Nations Human Rights Committee is in a sense part of the country’s judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it.” [1994] 2 N.Z.L.R. 257, 266 (C.A.). One need not agree with the court’s specific characterization of New Zealand’s accession to the treaty to

Similarly, New Zealand's Bill of Rights Act (BORA) has as one of its express purposes to "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights."³⁵³ While the Act does not formally incorporate the ICCPR's provisions into law, many of its provisions are identical to those found in the treaty. Accordingly, the New Zealand courts have cited legislative enactment of the BORA as evidence that the legislature intends to give domestic effect to at least some of the ICCPR's provisions.³⁵⁴

Whether or not one takes the view that such legislative acts amount to a kind of "effective" or "partial" implementation of the treaty, they certainly indicate a strong legislative approval of the treaty's substantive content. Such legislative acts thus may provide a kind of license for courts to utilize these treaties in interpreting domestic sources of law, while remaining faithful to their dualist roots.

B. Developing a Principled Jurisprudential Framework for Common Law Courts: Dualist in Orientation, Monist in Technique

To balance the competing concerns raised by the interpretive incorporation trend and its erosion of strict common law dualism, I offer here a normative framework structured around the historical dualism/monism dichotomy. In my view, common law courts need not consider themselves bound to a strict dualist approach to international law, but neither should they abandon dualism entirely. Instead, they should adopt a stance that is "dualist in orientation, but monist in technique": that is, they should seek to draw on the best of the monist-oriented interpretive techniques in their work, while remaining faithful to their historical dualist roots.³⁵⁵

In its conception of the proper role of courts as mediators between the domestic and international, my proposed dualist/monist framework differs significantly from the aggressively monistic conception proposed by some scholars and judges. The 1998 Bangalore Principles, for example, view common law judges primarily as *internalizers* of international human rights law;³⁵⁶ as I

acknowledge that the act might carry at least some weight in determining to what extent policymakers have intended to give the ICCPR domestic legal effect.

³⁵³ BORA, supra note 46.

³⁵⁴ See, e.g., *Hosking v. Runting*, [2004] N.Z.L.R. 1 (C.A.).

³⁵⁵ In this regard, courts can take instruction from the 1988 Bangalore Principles, which urged courts to "*have regard* to [unincorporated treaties] for the purpose of removing ambiguity or uncertainty from [domestic law]," while remaining firm in their dualist obligation to apply domestic law when it is "clear and inconsistent with [international law]." See supra text accompanying notes 63--69. The 1988 Principles thus urged courts to explore a variety of monist-oriented techniques to international law, while remaining fundamentally dualist in orientation.

³⁵⁶ See Jackson, *Constitutional Comparisons*, supra note 256, at 112--13 (discussing

discussed in Part I, they urge courts to “harmonize” domestic law with international human rights obligations.³⁵⁷ The constitutional *Charming Betsy* principle, with its expectation that courts will interpret domestic constitutions “in conformity with” international law, also suggests an aggressively monistic conception of the judicial role. In my view, courts should reject this conception, because it gives insufficient recognition to countermajoritarian concerns and to judges’ roles within the domestic constitutional regime.³⁵⁸

Most scholars propose a more moderate conception of the judicial role, in which domestic courts are part of a global judicial community that is developing a kind of transnational law of human rights. Jeremy Waldron, for example, urges the reinvigoration of the ancient principle of *ius gentium*, by which domestic courts would “seek guidance from the accumulated legal experience of mankind” as a guide to the elaboration and development of domestic law.³⁵⁹ Vicki Jackson suggests an “engagement model,” in which courts view foreign and international sources as “interlocutors, offering a way of testing understanding of one’s own traditions and possibilities by examining them in the reflection of others’.”³⁶⁰ Similarly, Justice Kirby of the Australian High Court has argued that domestic courts, in engaging in interpretive incorporation, should view themselves as exercising a kind of “international jurisdiction” that “merge[s] the national and the international.”³⁶¹

The dualist/monist framework offered here differs from the approach offered by other scholars in two respects. First, it urges courts to conceive of their roles as fundamentally dualist in orientation: In other words, courts should view themselves as deeply rooted, first and foremost, in the domestic legal regime. It is from domestic constitutional texts---not from vague notions of a “global judicial community”---that domestic courts obtain their legitimacy. Thus it is to these domestic legal sources, and not to international human rights treaties, that they owe their final allegiance.

Second, the dualist/monist framework differs from other approaches in that it emphasizes both a technique-specific and treaty-specific evaluative approach. Taking as their starting point the fundamental dualist premise that

“convergence” model as one in which courts view “national constitutions as sites for implementation of international law”).

³⁵⁷ See *supra* text accompanying notes 50--64.

³⁵⁸ See *supra* text accompanying notes 141-- (discussing monistic elements of constitutional *Charming Betsy*).

³⁵⁹ Waldron, *supra* note 124, at 139.

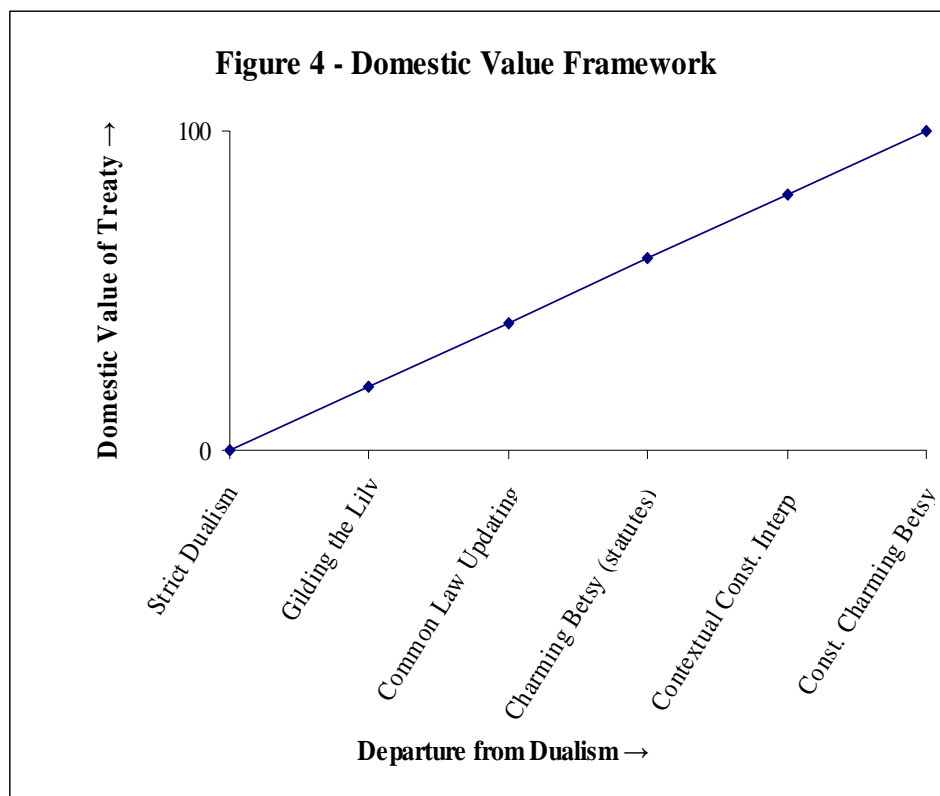
³⁶⁰ Jackson, *Constitutional Comparisons*, *supra* note 256, at 114.

³⁶¹ Kirby, *Impact on National Constitutions*, *supra* note 18, at 13.

³⁶⁸ See generally Sloss, *supra* note, at 165--69 (discussing restrictions adopted when United States signed on to ICCPR).

courts are firmly rooted in the domestic legal system, courts can then explore – on a case by case basis -- to what extent they can legitimately reach out to specific international sources for assistance, and what techniques they can legitimately use.

A principled jurisprudential approach to unincorporated treaties that is “dualist in orientation, monist in technique” would thus begin by developing a metric for measuring, on a case by case basis, the “domestic value” of the treaty in question: For example, to what extent is the treaty an authoritative expression of the views of the domestic polity? Figure 4 offers a simple schematic for how a normative framework based on “domestic value” might operate.



Among the factors that might be taken into account in measuring a treaty’s domestic value are legislative and executive intent regarding the treaty: Has it been ratified? Did the executive attach reservations, understandings or declarations modifying the treaty commitments with respect to particular treaty provisions? Despite the lack of implementing legislation, have policymakers taken any additional actions that might indicate particularly strong support for the treaty? In addition, an examination of legislative history might provide insights into a treaty’s value: Frequent references to treaty obligations in legislative reports or hearings might indicate strong ongoing legislative support for the treaty.

This approach---focusing on current indications of domestic political support for a particular treaty---will mean that treaties may enjoy high value in one domestic legal system, and fairly low value in another. Thus, for example, the ICCPR, despite its unincorporated status, clearly enjoys a very high domestic value in New Zealand: The executive acceded to the ICCPR’s Optional Protocol giving individuals the right to petition the Human Rights Committee, and the legislature explicitly “affirmed” the ICCPR in enacting the BORA. On the other hand, the ICCPR might be deemed a fairly low value treaty in the United States, given the numerous reservations, understandings, and declarations that accompanied U.S. ratification.³⁶⁸

By assessing the domestic value of a given treaty, courts can develop a rough sense of how it might be utilized in shaping domestic law, and which interpretive incorporation techniques might be well adapted to its use. As Figure 4 shows, the various techniques fall on a spectrum---from modest to much more radical shifts toward monism. For treaties that enjoy high domestic value, courts can appropriately utilize more aggressively monistic techniques; for those on the low end of the scale, courts should utilize the least aggressive techniques. Thus, it may well be appropriate for New Zealand courts to utilize the ICCPR in a contextual interpretation of that country’s domestic bill of rights, while U.S. courts would do well to limit their use of the treaty to a modest gilding the lily approach.³⁶⁹ These differing treatments of the ICCPR would be appropriate, given the different “values” that the treaty enjoys within the domestic polity.

A detailed elaboration of a “domestic value” framework is well beyond the scope of this Article. My goal here is simply to define the broad contours of a possible framework, and to suggest areas for further research. In fleshing out and defending such a framework, significant questions need to be addressed. First, in assessing domestic value, should the exclusive focus be on *executive* and *legislative* expressions of support for a given treaty, or is this an inadequate metric for assessing the domestic polity’s support for the treaty?³⁷⁰ Second, the domestic value framework that I suggest here is rooted in an empirical study of one

³⁶⁹ In my view, the constitutional *Charming Betsy* canon, narrowly defined to require domestic “conformity” with international human rights treaties, raises significant legitimacy concerns and represents too much of a departure from a dualist-oriented approach. The “domestic value” framework suggested here is preliminary in nature; thus I will not here rule out the possibility that the constitutional *Charming Betsy* canon might be used in the appropriate case, where the domestic value of a treaty was extraordinarily high. But at this preliminary stage, it is unclear to me what that “appropriate case” might be.

³⁷⁰ For example, should domestic value also encompass the views of nongovernmental organizations as to the importance of the treaty? What about the extent to which a treaty is cited in domestic human rights litigation? Of course, if the domestic value metric is expanded to include too many such factors, it becomes unworkable and loses its usefulness for courts. My exclusive focus on policymakers’ views avoids this problem, but it arguably does so at the price of failing to capture a complete picture of domestic support for a treaty.

particular treaty---the ICCPR. It is an open question whether the lessons learned from this study---and the evaluative framework based upon it---would transfer to other treaty contexts.³⁷¹ A fully articulated evaluative framework must be capable of assisting courts to evaluate the use of interpretive incorporation techniques with respect to a wide variety of treaties.

Conclusion

By bringing a narrow lens to the debate over “foreign authority,” the goal of this Article has been to dig deeper into both the practical and normative questions surrounding the debate. A narrow lens focus reveals trends in both judicial philosophy and judicial technique that have been obscured to date, and it enables scholars to critically examine these trends. The narrow lens focus on treaties indicates a mixed record thus far. On the one hand, it reveals the influence of creeping monism on the judicial philosophy of a significant number of the common law world’s most powerful judges. On the other hand, analysis of the case law itself reveals that the *practical* advance of creeping monism in the day-to-day work of courts has been fairly measured. Courts increasingly utilize human rights treaties in their work, and they are developing a variety of nuanced interpretive incorporation techniques to do so. But to date, most uses of human rights treaties have represented fairly modest departures from historical common law dualism.

There are some disturbing signs on the horizon, however. In some quarters, judicial conflation of the various interpretive incorporation techniques has accelerated the creep toward more radically monistic approaches to human rights treaties. If judicial advocates of the constitutional *Charming Betsy* principle are serious in their contention that constitutional law should be interpreted in conformity with international human rights law, they need to articulate thoughtful, well-reasoned normative justifications for their position. The current practice of citing far less radically monistic techniques by foreign courts as “support” is dubious, at best.

³⁷¹ Unratified treaties present a particular challenge. For example, in *Roper v. Simmons*, Justice Kennedy gilded the lily by citing the CRC as evidence of international opinion prohibiting the juvenile death penalty. See 543 U.S. 551, 576 (2005). For decades, U.S. policymakers have repeatedly refused to ratify the CRC. Was it, then, appropriate for Justice Kennedy to utilize this unratified treaty in his opinion, even to gild the lily? And what of the judicial practice---common in many common law courts---of citing regional human rights treaties to which their nations could not become a party (for example, the Canadian court’s citation of the African Charter on Human and People’s Rights)? See, e.g., *The Queen v. Advance Cutting & Coring, Ltd.*, [2001] 3 S.C.R. 209, 233 (Can.) (Bastarache, J., dissenting). Do such treaties ever have a role in interpretive incorporation, and if so, what is that role? An evaluative framework must be able to address such questions.

In *Lewis v. Attorney-General of Jamaica*,³⁷² the Privy Council utilized Jamaica's human rights treaty obligations---obligations to which the executive had acceded, but which the legislature had not incorporated into domestic law---to interpret the due process clause of the Jamaican Constitution.³⁷³ A dissenting judge complained, "the majority have found in the ancient concept of due process of law a philosopher's stone undetected by generations of judges which can convert the base metal of executive action into the gold of legislative power. It does not however explain how the trick is done."³⁷⁴

As courts expand their use of treaties to interpret domestic law, it behooves judges and scholars to "explain how the trick is done." What is needed is a fully articulated theory regarding judicial use of human rights treaties. The goal of such a project must be to develop an evaluative framework that enables courts to develop their emerging roles as mediators between the domestic and international legal regimes. The emergence of an ever-stronger mediating role for domestic courts is, in my view, inevitable. But the mediating role must be developed with great care and sensitivity to democratic legitimacy concerns. One possibility is the domestic value framework offered here, which urges courts to remain fundamentally dualist in orientation (and thus deeply rooted in the domestic polity), while encouraging them to explore at least some limited uses for treaties in interpreting domestic law. Whatever framework may be developed, it should be one that recognizes and embraces domestic courts' emerging roles as transnational actors---while paying more than mere lip service to the legitimate concerns expressed by the more jurisprudentially conservative among us.

³⁷² [2001] UKPC 1, [2001] 2 A.C. 50 (P.C.) (appeal taken from Jam.) (U.K.).

³⁷³ See *id.* at 59.

³⁷⁴ *Id.* at 88 (Hoffman, L., dissenting).